Supreme Court, U.S.
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No. 07-949

In the Supreme Court of the United States

ROBERT WHITE, PRO SE,

Petitioner;

v.

JOSEPH B. COLLINS,
Chapter 7 Trustee for
CK LIQUIDATION CORP,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 11 U.S.C. §503(b)(1)(A) allow administrative priority of a non-executory software royalty contract, in which the non-debtor is fully performed, when the debtor-in-possession continues selling software permitted under that contract, generating all its $1.5 mil. in post-petition revenue; or, according to the Bankruptcy Court, District Court, and First Circuit Court of Appeals, is a non-executory contract automatically and exclusively categorized as a pre-petition claim and therefore exempt from priority because the contract was negotiated pre-petition?

2. Did Petitioner's non-executory software royalty contract qualify as a property interest in the debtor's assets sold via a non-plan sale conducted pursuant to 11 U.S.C. §§363(b) & (f) and did 11 U.S.C. §363(e) give Petitioner the right to seek declaratory relief "at any time" to establish and protect his property interest; or, according to the Bankruptcy Court, District Court, and First Circuit Court of Appeals, is such a non-executory contract singularly relegated to the status of a pre-petition claim and therefore disqualified as a property interest in the debtor's assets?

3. Was Petitioner entitled to the equitable remedy of specific performance of his non-executory software royalty contract according to 11 U.S.C. §363(f)(5), and as provided under Massachusetts statutory law, because the value of Petitioner's future royalties due

under his contract could not be calculated with certainty; or, according to the Bankruptcy Court, District Court, and First Circuit Court of Appeals, since Petitioner's contract was automatically converted into an unsecured pre-petition claim then none of the protections in 11 U.S.C. §363(f)(1-5) applied to Petitioner's contractual interests in the debtor's assets?

4. When no other provision in 11 U.S.C. §363(f)(1-5) justifies the sale of Petitioner's interest in the debtor's assets, is a stockholder who purchases those assets via a non-plan sale required to abide by the "absolute priority rule" codified under 11 U.S.C. §1129(b)(2)(B)(ii) and pay a fair market price for the assets or make dissenting creditors whole according to the requirement in 11 U.S.C. §363(f)(5) that an "equitable proceeding" govern a §363 sale; or, according to the Bankruptcy Court, District Court, and First Circuit Court of Appeals, does the "absolute priority rule" apply only to a plan of reorganization and not to a §363 sale conducted outside a plan?

5. Is the Fifth Amendment protection against an unjust public taking of private property meant to be embodied within 11 U.S.C. §363(e) and does such a requirement for "adequate protection" prohibit a buyer from purchasing all the debtor's assets for 28% of fair market value when that buyer failed its "good faith" finding under 11 U.S.C. §363(m) after the Bankruptcy Court ruled the buyer committed perjury when testifying about its insider relationship with the debtor? That is, can a perjurious buyer ever satisfy

the public's interest in allowing a Fifth Amendment taking of a creditor's private property interest in the debtor's assets sold via a non-plan sale without the buyer of those assets either paying fair market value or making dissenting creditors whole, and does the debtor have the burden of justifying such a taking under 11 U.S.C. §363(p) ?

6. Did the Bankruptcy Court deprive Petitioner of his US Constitutional Rights to due process and to seek redress of his grievances by enjoining Petitioner from filing further motions without first issuing an order to show cause or holding a sanction hearing prior to issuing its pre-filing injunction, and did Petitioner deserve to be enjoined in the first place; or, according to the Bankruptcy Court, District Court, and First Circuit Court of Appeals, do Petitioner's so-called excessive filings justify the pre-filing injunction?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Robert White–Pro Se (hereafter "White"), an unsecured creditor in this bankruptcy appeal, respectfully petitions for a writ of certiorari to review the judgment of the United States court of Appeals for the First Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the First Circuit was issued on June 29, 2007 [1], affirming the judgment of the United States District Court for the District of Massachusetts, which was issued on August 28, 2006 [2]. The District Court affirmed the Bankruptcy Court's Orders denying White's Motion to Vacate the Sale Order [3] and Motion for Administrative Priority [4]. The District Court also affirmed the Bankruptcy Court's Pre-filing Injunction issued against White [5], each of the Bankruptcy Court Orders entered on May 9, 2006. Neither the Bankruptcy, District, or Circuit Courts published their rulings in this appeal.

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[1] Petitioner's Appendix (hereafter "PA") pgs. 2 - 3.
[2] PA pgs. 5 - 7.
[3] PA pgs. 9 - 16.
[4] PA pgs. 18 - 20.
[5] PA pgs. 22 - 23.

JURISDICTIONAL STATEMENT

The judgment of the First Circuit Court of Appeals was entered on May 29, 2007, and White's Motion for Reconsideration was denied on August 14, 2007 [6]. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(l). Pursuant to Supreme Court Rule 29(4)(b) and to 28 U.S.C. §2403(a), White has notified the Solicitor General of the United States that White has raised a "Constitutional Question" that has not yet been certified to the US Attorney General by a United States District or Circuit Court.

FEDERAL STATUTES AND CONSTITUTIONAL ISSUES INVOLVED

11 U.S.C. § 503. Allowance of administrative expenses

> **(b)** After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502 (f) of this title, including—
> **(1)**

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[6] PA pg. 25 – docket for appeal on PACER web site for the First Circuit Court of Appeals showing the Circuit Court's denial of White's Motion for Reconsideration on August 14, 2007.

(A) the actual, necessary costs and expenses of preserving the estate including—

11 U.S.C. § 363. Use, sale, or lease of property

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(p) In any hearing under this section—
(1) the trustee has the burden of proof on the issue of adequate protection; and

The Fifth Amendment to the US Constitution provides in pertinent part:

> No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF CASE

This appeal challenges how a non-executory software royalty contract should be administered under sections 503 and 363 the Bankruptcy Code [7], when the non-debtor (White) is fully performed and the Debtor-in-possession continues to sell software and generate revenue permitted under the contract and then sells its interest in that contract to a buyer of all the assets via a non-plan sale.

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[7] All code citations are to Title 11 of the US Codes unless otherwise indicated.

White filed two separate yet related and nearly simultaneous motions in Bankruptcy Court to establish how his non-executory software royalty Contract (hereafter the "Contract" [8]) should be administered under the Bankruptcy Code. White's first motion [9] sought declaratory relief and/or reversal of the Sale Order [10] to establish that the remaining two years of post-petition royalties due under his Contract survived the non-plan sale and were entitled to specific performance according to §363(f)(5). White also sought to establish that a stockholder must pay a fair market price for the debtor's assets sold at a non-plan sale or make dissenting creditors whole according to the "absolute priority" rule.

White's second motion [11] sought administrative priority for post-petition royalties due under his Contract, pursuant to §503(b)(1)(A), after the Debtor-in-possession generated all of its $1.5 mil. in post-petition revenue from selling software permitted under White's Contract.

White filed his two motions two and a half (2 & ½) years after the Sale Order was ratified. White argued in his Motion to Vacate and at the hearing that the Bankruptcy Court's Sale Order is

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[8] PA, pgs. 26 - 48, White's Contract.

[9] Bankruptcy Court docket #724 – White's Motion to Vacate.

[10] Bankruptcy Court docket #121 – Sale Order.

[11] Bankruptcy Court docket #764 – White's Administrative Priority Application.

void for lack of due process according to Federal Rule of Civil Procedure 60(b)(4) because White had a property interest in the Debtor's assets sold thru the non-plan sale and the Buyer of all the Debtor's assets served faulty notice on White four (4) days prior to the non-plan sale announcing that the Debtor and Buyer were assuming White's Contract[12] when in fact the Debtor and Buyer violated that notice and moved to reject White's non-executory Contract two (2) months after the sale [13], thus violating White's right to due process at the sale by inducing White into believing and acting as though his contractual property interests were not at issue.

The Bankruptcy Court denied all requests in both motions, ruling that royalties due under White's non-executory Contract represented a pre-petition claim, exempt from priority under §503(b)(1)(A) because the Contract was negotiated pre-petition; and, since the Contract converted to a pre-petition claim the Contract did not qualify as a property interest in the Debtor's assets sold pursuant to §§363 (b) & (f). Both the District Court and First Circuit Court of Appeals affirmed all aspects of the Bankruptcy Court's rulings.

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[12] Bankruptcy Court docket #105 - Buyer's Bid & Purchase Agreement, List of Assigned Contracts attached thereto. White's contract is listed as an Acquisition Agreement with the pre-petition Debtor - Baystate Technologies.

[13] Bankruptcy Court docket #230 - Debtor's Motion to Assume and Reject Contracts, Exhibit B attached thereto – Contracts to be Rejected = FastSURF Inc.

In effect, by categorizing White's Contract to be a pre-petition claim, exempt from priority and disqualified as a property interest in the Debtor's assets sold, the Bankruptcy Court and supporting Courts of review allowed the Debtor-in-possession to reject White's non-executory Contract, extinguishing its remaining terms and liabilities, thereby allowing the Debtor to use White's property post-petition and to transfer White's property interest to the Buyer without just compensation or due process of law.

The statutory mistakes in the Courts' decisions on these issues are that: 1) non-executory contracts cannot be rejected under the Bankruptcy Code; therefore, the terms of White's Contract remained valid post-petition as did the Debtor's and Buyer's liabilities under that Contract, 2) the Debtor alone elected to incur a contingent post-petition liability to pay royalties to White by continuing to sell software permitted under White's Contract, which benefited the estate; therefore, White's claim for post-petition royalties met the statutory definition of an administrative claim, 3) nothing in the logic or language of the Bankruptcy Code converts the remaining two years of royalties due under White's non-executory Contract into a pre-petition claim; that is, a contingent post-petition liability is not automatically or even exclusively converted into a pre-petition claim; therefore, White's Contract remained valid post-petition and was not disqualified as a property interest in the assets

sold, 4) once the Debtor elected to hold a non-plan sale pursuant to §363(b), something in §363(f) must work to convert White's property interest into a claim attaching to sale proceeds, and nothing does; therefore, White's Contract survived the sale and was entitled to specific performance, thereby activating the assignment clause within White's Contract, which transfers the Debtor's liability under White's Contract to the Buyer, 5) a stockholder must abide by the "absolute priority rule" in a contested non-plan sale when "taking" a creditor's interest in the assets sold if the sale is to be conducted according to an "equitable proceeding" as required under §363(f)(5) and the sale is to provide "adequate protection" of a creditor's interests and rights as required under §363(e), 6) a creditor may seek to establish and protect his property interest in the debtor's assets "at any time" according to §363(e), even after those interests and assets are sold via an expedited non-plan sale; especially when the Buyer failed its "good faith" finding and §363(m) does not moot such a challenge.

Finally, White challenges the Bankruptcy Court's injunction [14] which prohibits White from filing further motions in the Bankruptcy Court. The Bankruptcy Court ruled that White's Motion to Vacate and White's Motion for Administrative Priority were both frivolous. The Bankruptcy Court relied on its inherent powers to enjoin White;

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[14] PA, pgs. 22 - 23.

however, the Bankruptcy Court's pre-filing injunction violates several provisions in both case law and statutory law for issuing pre-filing injunctions. Namely, the Bankruptcy Court did not issue an order to show cause or hold a hearing prior to issuing its injunction, in clear violation of the procedure for issuing pre-filing injunctions established in ***Cok v. Family Court of Rhode Island*, 985 F.2d 32 (1st Cir.1993)**. Additionally, the Chapter 7 Trustee's request for the injunction was combined with the Trustee's opposition to White's 60(b)(4) Motion to Vacate, when Federal Bankruptcy Rule 9011(c)(1)(A) requires a request for sanctions to be filed separately from any other motion.

FACTS AND HISTORY

White sold his NURBS [15] and ACIS ™ [16] based surface and solid modeling software products and computer source code to the pre-petition

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[15] NURBS (Non-uniform Rational Bezier Spline) surface modeling code is a numerical system of computer algorithms for modeling and manipulating complex surfaces found in the automotive, aerospace, and consumer products industries. These CAD algorithms perform such operations as creation, intersection, and projection of points, curves, and surfaces onto and with other surfaces.

[16] ACIS is a library of solid modeling algorithms owned by and licensed from Spatial Corporation, a wholly owned subsidiary of Dassault Systems from France. Solid modeling is a system of defining and manipulating geometric volumes defined by the combination of primitive shapes such as: cubes, cylinders, spheres, cones, torii, and complex surfaces.

Debtor, Baystate Technologies, Inc. – d.b.a. CADKEY Corporation, in 1998 through an Asset Purchase Agreement (the Contract). In that Contract the Debtor agreed to pay White a 2.5% royalty for the next seven (7) years based on its gross revenue generated from the sale of the Debtor's products containing surface and solid modeling technology the Debtor purchased from White [17].

White did not take a security interest back in his technology, nor structure the Contract as a loan, nor was the Contract written as a licensing agreement. White sold his property outright to the Debtor who took immediate possession and ownership of White's intellectual property and the Debtor immediately integrated White's computer code into the Debtor's CAD (Computer Aided Design) product. However, Section 1.02 of the Contract does stipulates that the royalty payments due under the Contract represents a reservation of White's interest in his property[18].

The Debtor did not make a down payment toward the purchase of White's property, nor were any minimum payments required or ever paid under the Contract, nor did White receive payment for his property from any other source, like stock, other than royalties on products sold by the Debtor containing technology the Debtor purchased from

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17 PA, pg. 29, White's Contract - Sec. 1.04.

18 PA, pg. 29, White's Contract - Sec. 1.02(b).

White.

The Debtor made royalty payments to White every quarter for five (5) years prior to the petition date, with a brief forbearance granted by White for two (2) consecutive quarters a year prior to the Debtor's petition for bankruptcy in order to allow the Debtor to restructure its other debts. When the Debtor petitioned for Chapter 11 protection on August 22, 2003, there were nine (9) quarters of software sales and royalty payments remaining to be performed by the Debtor under White's Contract, and the next regularly scheduled quarterly royalty payment under the Contract was due on November 1, 2003 [19], nine (9) weeks after the petition date.

White's unpaid pre-petition royalties are based upon pre-petition sales in the quarter prior to the petition date, and the Debtor has never disclosed the amount of those royalties to White. However, White's unpaid post-petition royalties are known and calculate to be approximately 37,500 [20] according to revenue disclosures made

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[19] PA, pg. 29,White's Contract - Sec. 1.04 (a). White's Contract stipulates that royalty payments are due 30 days after the end of each calendar quarter.

[20] Trustee's Avoidance Recovery Action against White, related case No. 04-4525, docket # 1, exhibits attached thereto are the Debtor's records of quarterly royalties paid to White by wire transfer within 90 days of the petition date. Since White's royalty represents 2.5% of the Debtor revenue, these royalty payments of $18,655.81 during the quarter

by the Debtor during bankruptcy [21], and those royalties were all generated post-petition by the Debtor [22] prior to the Debtor selling its assets to the Buyer [23].

All the parties (Buyer, Chapter 7 Trustee [24], and White) now agree that White's Contract is non-

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prior to the petition date show that the Debtor earned approximately $746,200 in the calendar quarter pre-petition, and about the same per quarter post-petition according to the Debtor's post-petition revenue disclosures - see footnote 21 below.

[21] Bankruptcy Court docket #158 - Debtor's Cash Collateral Agreement with the single secured creditor. The agreed budget attached thereto shows over $1,000,000 in post-petition revenue; however, not shown is over $500,000 in accounts receivable pending at the closing of the sale.

[22] White does not claim that the small amount of unpaid pre-petition royalties deserve administrative priority, nor has the debtor ever informed White what those royalties calculated to be. White recognizes that any unpaid pre-petition royalties due under his Contract represent a general unsecured pre-petition claim pursuant to §101(5), §502, §503, and §726.

[23] The sale closed on December 3, 2003, after which White contends the Buyer and not the Debtor owed White royalties. Four (4) months of unpaid royalties were generated by the post-petition Debtor prior to the sale and total approximately $37,500, based on the Debtor's post-petition revenue of $1,000,000 and over $500,000 in accounts receivable sold as assets which normally would have generated a royalty for White, see Buyer's Purchase Agreement, Bankruptcy Court docket #105, pg. 2, pp. 1.1.10.

[24] The Debtor converted from Chapter 11 to a case under Chapter 7 of the Bankruptcy Code on March 14, 2004 – Bankruptcy Court docket 239.

executory [25, 26]; however, the Debtor and Buyer categorized White's Contract to be executory prior to and after the non-plan sale. For example, the Buyer declared to assume White's Contract four (4) days prior to the non-plan sale [27] and the Debtor then moved to reject White's non-executory Contract two (2) months after the sale [28], even though assumption and rejection are reserved for executory contracts only according to §365(a).

On the petition date, August 22, 2003, the Chapter 11 Debtor entered into a purchase agreement with IMSI, who became the Stalking Horse, and who agreed to bid for substantially all the Debtor's assets in a non-plan sale [29]. In response, the Debtor's largest investor, Kubotek, a publically traded corporation in Japan, who owns 17.5% of the Debtor's stock, filed a competing purchase agreement on October 16, 2003 [30]. At

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[25] Bankruptcy Court docket # 774 - Trustee's Opposition to White's Administrative Expense Application, pg. 3, pp. 8 & fn. 2.

[26] Bankruptcy Court docket # 782 - Transcript Motion to Vacate Hearing, April 25, 2006, pg. 14, ln. 22.

[27] Bankruptcy Court docket # 105 - Buyer's Bid & Purchase Agreement, Schedule 1.1.12 attached thereto, "Assigned Contracts" list.

[28] Bankruptcy Court docket # 230 - Debtor's Motion to Assume and Reject Contracts pg. 7 - 8, pp. 17, and Exhibit B attached thereto.

[29] Bankruptcy Court docket # 25- Debtor's Sale Motion, IMSI Purchase Agreement attached thereto as Exhibit A.

[30] Bankruptcy Court docket # 105 - Buyer's Bid & Purchase Agreement.

the auction, held on October 27, 2003, neither buyer increased their bid, therefore Kubotek was declared the winning bidder with the highest purchase agreement offer. However, Kubotek was found to have committed perjury when testifying and could not secure a "good faith" finding and declined to accept the assets [31]. The only other bidder at the auction, IMSI, who was the Stalking Horse, also declined to accept the assets after winning the bidding by default with the next highest bid and withdrew from the sale; therefore the auction ended without a winner. Ten (10) days later, on November 6, 2003, the perjurious stockholder returned to Bankruptcy Court with new conditions for the Sale Order [32] and agreed to close the sale (Kubotek is the "Buyer" previously and hereafter referenced).

On October 16, 2003, just four (4) days prior to the first day of sale hearings, the Buyer notified White that the Buyer intended to assume White's Contract [33]. The Buyer placed White's Contract

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[31] Bankruptcy Court docket # 245, - Transcript Oct. 27, 2003 Sale Hearing, pg. 48 : ln. 4 – pg. 52 : ln. 9.

[32] The new conditions for the sale were that, Bowers (the largest unsecured creditor) would accept $750,000 outside the bankruptcy as settlement of his pending District Court Injunction against the Debtor (see Bankruptcy Court docket #244 - Transcript October 30, 2003 Sale Hearing, pg. 3, ln. 12), and, the estate would fund $250,000 of the sale proceeds toward any appeal of the Sale Order by White (see Bankruptcy Court docket # 243 - Transcript November 6, 2003, Sale Hearing, pg. 6, ln. 12 - 25).

[33] Bankruptcy Court docket # 105 - Buyer's Bid & Purchase

on its "Assigned Contracts" list attached to its purchase agreement which the Buyer filed with the Bankruptcy Court and served on creditors, including White.

On the last day of sale hearings, held three (3) weeks later, on November 6, 2003, the Debtor and Buyer removed White's Contract from the final "Assigned Contracts" list attached to the Sale Order [34] which was endorsed by the Bankruptcy Court. Two (2) months later, on January 9, 2004, the Debtor and the Buyer notified White they were rejecting his Contract [35] even though the Debtor continued selling software permitted under White's Contract during the bankruptcy, up to the closing of the sale on December 3, 2003, without paying White his royalty.

White immediately appealed the Sale Order, filing pro se after his attorney resigned. White challenged whether the Debtor used good business judgment in selling all its assets for 28% value. However, since the Debtor and Buyer had not rejected White's Contract at the time of White's first appeal, White did not litigated nor appeal the status of his property interest in the assets sold.

Agreement, Schedule 1.1.12 attached thereto, "Assigned Contracts" list.

[34] Bankruptcy Court docket # 121, - Sale Order, Assigned Contracts attached thereto as Exhibit A.

[35] Bankruptcy Court docket # 230 - Debtor's Motion to Assume and Reject Contracts, Exhibit B attached thereto – Contracts to be Rejected = FastSURF Inc.

The District and Circuit Courts dismissed White's appeals, affirming the Sale Order, and this Court denied certiorari in case no. 05-8146.

ARGUMENT

The Bankruptcy Code Does Not Allow a Buyer To Take a Creditor's Property Interest Via an Non-Plan Sale Without Adequate Protection or Justification Under §363(f)

While the US Constitution vests authority in Congress to provide for bankruptcy relief, and such relief often entails paying creditors less than they are owed for their claims, any taking of an interest in property from a creditor must find clear statutory support in the Bankruptcy Code. As summarized by this Court in ***Hanover National Bank v. Moyses*, 186 U.S. 181, 188 (1902)**, bankruptcy regulations must adhere to the US Constitution:

> Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law, ...

However, in ***Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry.*, 294 U.S. 648, 673–75 (1935)**, this Court recognized that bankruptcy powers are limited:

> But, while it is true that the power of Congress under the bankruptcy clause is not to be limited by the English or Colonial law in force when the Constitution was adopted, it does not follow that the power has no limitations.

Additionally, in ***Louisville Joint Stock Land Bank V. Radford*, 295 U.S. 555 (1935)**, this Court held that "the bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment".

The question is then what specific section of the Bankruptcy Code allowed the Debtor to transfer White's contractual interest in the Debtor's assets to the Buyer without adequate protection or just compensation, and what specific section of the Bankruptcy Code converted the remaining two (2) years of White's non-executory Contract to a pre-petition claim?

White's Contract Is Not Executory

11 U.S.C. §365(a) allows the debtor to assume or reject executory contracts and §502(g) converts damages caused by the rejection to a pre-petition claim; however, the Bankruptcy Code leaves non-executory contracts intact and valid post-petition. According to ***In re Stewart Foods, Inc*., 64 F.3d 141 (4th Cir. 1995)**, non-executory contracts cannot be assumed or rejected.

> § 365 applies only to executory contracts, a debtor-in- possession does not have the option of rejecting or assuming non-executory contracts and remains bound by the debtor's obligations under those contracts after the bankruptcy filing.

The United States House of Representatives Report No. 95-595, 95th Cong., 1st Sess. 347 (1977) attempted to define the concept of "executory" as:

> [t]hough there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides.

Additionally, in ***In re Spectrum Information Technologies, Inc.*, 190 B.R. 741, 748 (Bankr. E.D.N.Y.1996)** that Court established:

> where the only performance that remains is the payment of money, the contract will not be found to be executory.

At the core of these authorities lies the logic behind why the Bankruptcy Code allows the rejection of executory contracts. It is equitable to allow the debtor to breach an executory contract when the non-debtor is forgiven of his remaining duties as well. However, when the non-debtor has

no remaining duties to perform or forgive it is inequitable to forgive the debtor from performance of its duties, obligations, and liabilities.

White had performed his obligations in full under his Contract by delivering his source code to the pre-petition Debtor, at the inception of the Contract in 1998. The Debtor's remaining performance under the Contract was that of selling software and paying a royalty to White. Therefore, White's Contract was not executory, whereby the post-petition Debtor had no right to breach or reject White's Contract , and White's Contract was not invalidated by the bankruptcy.

In ***NLRB v. BILDISCO***, **465 U.S. 513, at 531**, this Court recognized:

> If the debtor-in-possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services, Philadelphia Co. v. Dipple, 312 U.S. 168, 174 (1941), which, depending on the circumstances of a particular contract, may be what is specified in the contract, see In re Public Ledger, 161 F.2d 762, 770-771 (CA3 1947). See also In re Mammoth Mart, Inc., 536 F.2d 950, 954-955 (CA1 1976). Should the debtor-in-possession elect

> to assume the executory contract, however, it assumes the contract cum onere, In re Italian Cook Oil Corp., 190 F.2d 994, 996 (CA3 1951), and the expenses and liabilities incurred may be treated as administrative expenses, which are afforded the highest priority on the debtor's estate, 11 U.S.C. 503(b)(1)(A) (1982 ed.).

However, when the debtor-in-possession elects to exercise rights and "receive benefits" under a contract it makes no difference whether the contract is executory or non-executory, the debtor-in-possession still must fulfill its self-imposed liabilities under that contract, as demonstrated below.

Administrative Priority

As stated in ***In re FBI Distribution Corp.*, 330 F.3d 36 (1st Cir. 2003)** priority claims must benefit the estate and represent post-petition transactions :

> In general, for a claim to qualify as an administrative expense under subsection 503(b)(1), (1) it must have arisen from a transaction with the trustee or debtor in possession, rather than from a prepetition transaction with the debtor, and (2) the consideration supporting the claim must have benefitted the estate in

some demonstrable way.

And, as recognized in ***In re Mammoth Mart, Inc.*** **536 F.2d 950, at 955 (1st Cir. 1975),** entitlement to administrative priority depends on whether the transaction supporting the claim was initiated by the Debtor-in-possession:

> It is only when the debtor in possession's actions themselves– that is, considered apart from any obligation of the debtor – give rise to a legal liability that the claimant is entitled to the priority of a cost and expense of administration.

In our instant case, the Debtor alone elected to continue to exercise rights, enjoy benefits, and engage in transaction post-petition which were permitted under White's Contract. The Debtor-in-possession generated all of its $1.5 mil. in post-petition revenue and accounts receivable (prior to its non-plan sale) from selling software permitted under White's Contract. These transactions certainly benefitted the estate by allowing the Debtor to sell its business as a going concern.

Additionally, as stated in ***In re Commercial Financial Services, Inc.***, **246 F.3d 1291 (10th Circuit 2001)**, courts look to when the liability for the administrative claim occurred, not when the right to payment occurred:

> ...the liability must arise post-petition; it is not enough that the right to payment arose after the debtor in possession assumed control.

In our instant case White's unmatured "right" to payment of royalties arose when the Debtor and White signed the Contract pre-petition, in 1998. However, the Debtor's contingent "liability" to pay those royalties arose post-petition after the Debtor elected to continue selling software permitted under White's Contract. If the Debtor had not sold software post-petition permitted under White's Contract the Debtor would not have incurred a post-petition liability to pay White a royalty. Under the "liability/right" dichotomy articulated in ***In re Commercial Financial Services, Inc.***, White's post-petition royalties represent a valid administrative claim.

Ordinary Course of Business

In ***Reading Co. v. Brown***, **391 U.S. 471 (1968)**, this Court recognized that "costs ordinarily incident to operation of a business." fall within the Bankruptcy Code's general definition of administrative expenses and such expenses are afforded administrative priority under §503(b)(1) when they are "the actual, necessary costs and expenses of preserving the estate."

Courts analyze "ordinariness" according to a "horizontal" and "vertical" test, see ***In re Lavigne*, 114 F.3d 379, 384 (2nd Circuit 1997)**.

The horizontal test analyzes the ordinariness of the Debtor's transaction according to practices common in the Debtor's own industry. The vertical test analyzes the transaction in question according to the ordinariness of the Debtor's past business practices and according to those transactions in which creditors might reasonably expect the Debtor to engage. As stated in ***In re Lavigne***:

> The touchstone of 'ordinariness' is thus the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business.

See also ***In re Roth American***, **Inc. 975 F.2d, 949, at 953 (3rd Circuit 1992)**.

It is undisputed that the Debtor generated all of its $1.5 mil. in post-petition revenue and accounts receivable (prior to its non-plan sale) from selling software permitted under White's Contract and those software sales had always generated a royalty for White during the five (5) years pre-petition After paying White a royalty during each quarter for the five (5) years pre-petition it is clear that the Debtor paid White's contractually based royalties in the ordinary course of the Debtor's pre-petition business.

It is also clear from the Debtor's schedule of

debts and contracts [36] filed with the Bankruptcy Court that the Debtor contracted with numerous other software developers like White for inclusion of their intellectual property within the Debtor's products, all in the ordinary course of the Debtor's business. Every creditor should have reasonably expected the Debtor to continue paying White's royalty during bankruptcy in the Debtor's ordinary course of business. Accordingly, White's claim passes the horizontal and vertical tests for justifying payment as a priority administrative expense.

All the above cited precedents establish that White's Contract cannot be rejected or breached under the Bankruptcy Code by the Debtor-in-possession, and royalties due from the Debtor's post-petition sales of software permitted under White's Contract are entitled to priority status because those software sales were initiated at the sole discretion of the Debtor-in-possession, benefitted the estate, and were made in the ordinary course of the Debtor's business.

White's Contract Survives the Non-Plan Sale and Assigns to the Buyer

Because of the assignment clause in White's Contract, and because White's royalties attached to a specific set of the Debtor's assets, White's

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[36] Bankruptcy Court docket # 41, Debtor's Schedule G, containing certain executory contracts described as license agreements.

Contract representes an interest in the Debtor's property sold under §§363(b) & (f). Once the Debtor elected to hold a non-plan sale then §§363(f) and (e) governed the Debtor's assets and White's interest in them. Accordingly, White's request for declaratory relief to establish that his Contract survived the sale and assigns to the Buyer through specific performance under §363(f)(5) is nothing more or less than a request for "adequate protection" of his property interest which White is entitled to make "at any time" under §363(e). While the Bankruptcy Court ruled that White's Motion to Vacate was untimely, White's request for adequate protection of his Contract through specific performance is not time barred under §363(e) and can be requested "at any time", especially since the Buyer failed its "good faith" finding under §363(m).

The Debtor's remaining obligations under White's Contract, which became due during the two (2) years after the sale, survive the bankruptcy and assign to the Buyer through the assignment clause in White's Contract. The assignment clause in White's Contract mandates that:

> Section 10.05. Assignment. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns, provided that this Agreement may not be assigned to any third party without the prior written consent of the other party;

> provided however that Purchaser may assign this Agreement in connection with the sale of substantially all of its business assets, or a transaction of substantially the same effect [37].

The non-plan sale was just such "a transaction of substantially the same effect" as "the sale of substantially all of its business assets"; therefore, White's Contract attaches to the Debtor's assets and assigns to the Buyer of those assets both inside and outside of bankruptcy.

White's Contract Represented A Property Interest in the Debtor's Assets Sold Pursuant to §363(f)

The First Circuit has noted, " 'interest in property' . . . is unequivalent to, and broader than, the term 'lien' ", see ***In re 229 Main Street Ltd. P'ship*, 262 F.3d 1, 7 (1st Cir 2001)** [38]. The BAP for the First Circuit has held, " [t]he phrase 'any interest' in §363(f) is meant to cover the same scope of interests for entities other than the estate as those encompassed in the definition of property of the estate.", see ***Ragosa v. Canzano (In re***

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[37] PA, pg. 45,White's Contract, Sec. 10.05

[38] The *229 Main Street* Court was referring to "interest in property" appearing in Bankruptcy Code §362(b)(3), however the BAP for the 1st Circuit held that "interest in property" defined by the *229 Main Street* Court applied equally to §363(f), see *Ragosa v. Canzano (In re Coarusso)*, 295 F.R. 166, 174 (BAP 1st Cir. 2003).

Coarusso), 295 F.R. 166, 174 (BAP 1st Cir. 2003). In order to facilitate non-plan sales the trend in the Circuits is to allow a broader interpretation of "interests in property" to include not only in rem interest but also "other obligations that may flow from ownership of property." 3 Collier on Bankruptcy 363.06[1](15th Ed. Rev. 203).

White's royalties represents just such an obligation flowing from the Debtor's purchase of White's intellectual property. Similarly, "interest in property" includes obligations to make payments to a benefit plan, see ***United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)***, 99 F.3d 573, 585 (4th Cir. 1996), cert. denied 520 U.S. 1118 (1997). The general consensus in the Circuits is that §363(f) creates an interest in the property sold as long as the interest is connected to or arises from the property being sold and would under normal circumstances follow the property when sold, see ***In re Trans World Airlines, Inc.***, 322 F.3d 283 (3rd Cir. 2003). White's Contract and the assignment clause therein create just such an interest attaching to the property sold by the Debtor.

In ***Tennessee Student Assistance Corporation V. Hood***, 541 U.S. 440 (2004) this Court recognized that administration and discharge of a claim or interest via a §363 sale is an "in rem" proceeding:

The discharge of a debt by a bankruptcy court is similarly an in rem proceeding. See Gardner v. New Jersey, 329 U. S. 565, 574 (1947); Straton v. New, 283 U. S. 318, 320–321 (1931); Hanover Nat. Bank v. Moyses, 186 U. S. 181, 192 (1902); New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 656, 662 (1876). Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate.

...

A bankruptcy court's in rem jurisdiction permits it to "determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is 'one against the world.'" 16 J. Moore, et al., Moore's Federal Practice §108.70[1], p. 108–106 (3d ed. 2004).

...

And in Van Huffel v. Harkelrode, 284 U. S. 225, 228–229 (1931), we held that the Bankruptcy Court had the authority to sell a debtor's property "free and clear" of a State's tax lien. At least when the bankruptcy court's jurisdiction over the res is unquestioned, cf. United States v. Nordic Village, Inc., 503 U. S. 30 (1992), our cases indicate that the

> exercise of its in rem jurisdiction to discharge a debt does not infringe state sovereignty.

This precedent recognizes that the conversion of a encumbrance to a claim via §363(f) is an "in rem" proceeding .

11 U.S.C. §363(f)(1-5) Leaves White's Interest Intact

In a non-plan sale authorized under §§363 (b) or (c), one of the provisions in §363(f)(1-5) must work to convert a creditor's interest in the debtor's property to a claim attaching to the sale proceeds, which in turn authorizes the sale to be conducted free and clear of that creditor's interest. In our instant case the Sale Order purported to convert all encumbrances on the assets into claims [39]; however, the Sale Order failed to identify which provision in §363(f) converted White's interest into a claim, and none do. Therefore, the Bankruptcy Court overreached its statutory authority by converting White's interest in the Debtor's property to an unsecured claim via §363(f).

11 U.S.C. §363(f)(1) does not convert White's Contract to a claim because the Debtor's assets could not be sold free and clear of White's interest by way of some hypothetical non-bankruptcy proceeding. 11 U.S.C. §363(f)(2) does not impose

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[39] Bankruptcy Court docket # 121 – Sale Order, pg. 3, pp. F.

White's consent to the sale because White filed two (2) formal objections prior to the non-plan sale and did not consent to the sale then [40] [41], and does not consent now. In any event, the Buyer, Debtor, and Chapter 7 Trustee are judicially estopped from arguing that White consented to the sale because the Buyer and Debtor induced White into believing that his Contract was not at issue during the sale after the Buyer filed notice it was assuming White's Contract and then bid for the assets with White's Contract included. 11 U.S.C. §363(f)(3) is inapplicable to converting White's interest to a claim because White's Contract is not secured by a lien. 11 U.S.C. §363(f)(4) does not convert White's Contract to an unsecured claim because the Chapter 7 Trustee and Buyer both argue that White does not have an interest in the Debtor's assets [42] [43]. For there to be a "bonafide dispute" under §363 (f)(4), the party opposing White must argue that White has an interest in the assets sold, else that party cannot argue that §363(f) converts White's interest to a claim. Even if there was a bonafide dispute between the parties over White's alleged property interest in the assets sold, §363(e)

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[40] Bankruptcy Court docket # 38, White's Objection to the Bidding Procedures.

[41] Bankruptcy Court docket # 102, White's Objection to the Sale.

[42] Bankruptcy Court docket # 782 - Transcript Motion to Vacate Hearing, April 25, 2006, pg. 10 : ln. 2 - pg. 3 : ln. 2.

[43] Bankruptcy Court docket #755 - Buyer's Opposition to White's Motion to Vacate pg. 3, ln. 1.

allows White to establish and protect his property interest "at any time".

Finally, §363(f)(5) did not convert White's Contract to a claim. Normally, money damages are the remedy for a breach of contract; however, when the object contracted for is unique or the damages cannot be calculated with certainty, then specific performance is the remedy for breach of contract under Massachusetts law, see ***Ocean Spray Cranberries, Inc. v. PepsiCo, Inc.*, 160 F.3d 58 (1st Cir.1998)** stating:

> Still, injunctive relief requiring performance of a contract may ordinarily be granted (if other prerequisites are met) where monetary damages will not afford complete relief. A common example is agreements involving the sale of real property; specific performance is often granted because property is considered unique. See , e.g. , Walgreen Co. v. Sara Creek Property Co. , 966 F.2d 273, 278 (7th Cir. 1992). The same principle applies where harm caused by a breach, although economic in nature, is impossible to measure accurately. See Ross-Simons , 102 F.3d at 19.

In ***In re Haskell L.P.*, 321 B.R. 1 (Bankr. D. Mass. 2005)**, the Massachusetts Bankruptcy

Court ruled that under §363(f)(5) a landlord-debtor could not compel a sale free and clear of the tenant's leasehold interest because the tenant could not be compelled to accept a monetary satisfaction of its claim where the amount of damages could not be quantified with certainty. In such cases the Court ruled that specific performance is the only equitable remedy for the breach of a leasehold contract when damages cannot be calculated with certainty. The same consideration applies to White's Contract.

State law determines property rights in federal court unless a federal purpose mandates otherwise, see ***Butner v. United States*, 440 U.S. 48, 54-55, 99 S. Ct. 914, 918 (1979)**; and, federal preemption of state's rights is only appropriate when specifically expressed by a Federal Statute. Section 10.04 of White's Contract stipulates that Massachusetts Law governs his Contract [44]. Under Massachusetts law, Mass. Gen. Laws 214, § 1A, a contracting party enjoys the equitable remedy of specific performance to force the breaching party to carry out its contractual duties, see ***Poltorak v. Jackson Chevrolet Co.*, 322 Mass. 699, 700, 79 N.E.2d 285, 286-87 (1948)**.

At the time of the sale White's Contract was valid because it could not be rejected and did not convert to a pre-petition claim and the only way to

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[44] PA, pg. 45, White's Contract, section 10.04.

calculate the value of the two (2) years of royalties remaining due under White's Contract was for the Debtor or Buyer to pay those royalties based on actual sales. That is, specific performance is the only way to calculate the value of White's Contract because future product sales and royalties cannot be calculated with certainty. Given that specific performance leaves White's Contract intact, White's Contract assigns to the Buyer through its assignment clause.

11 U.S.C. §363(f)(5) Invokes the Absolute Priority Rule

Massachusetts Bankruptcy Courts have ruled that §363(f)(5) can compel a party of interest to accept money for their interest in the debtor's property if that party could be so compelled under a plan of reorganization. In ***In re Healthco Int'l., Inc.*, 174 B.R. 174 (Bankr. D. Mass. 1994)** the Court ruled that during a non-plan sale if the creditor's interest could be "crammed down" under a plan of reorganization, then §363(f)(5) was satisfied because a plan is just such an "equitable proceeding" anticipated under §363(f)(5). If Massachusetts Bankruptcy Courts accept that the "cramdown" provision of a plan of reorganization works to allow a non-plan sale under §363(f)(5), then the "absolute priority rule" must apply to a non-plan sale as well because adherence to the "absolute priority rule" is the statutory prerequisite for a "cramdown" under a plan of

reorganization. Therefore, when no other provision in §363(f) works to convert a creditor's interest in the debtor's assets to a claim, and the buyer is a stockholder, then §363(f)(5)'s requirement that an "equitable proceeding" govern a §363 sale also invokes the "absolute priority rule".

In our instant case a cramdown was not tolerable and a plan of reorganization could not be confirmed against unsecured creditors' objections because the Buyer was a stockholder who did not pay a fair market price for the assets or make senior creditors whole, as required under §1129(b)(2)(B)(ii). Even though §363(f)(3) only requires that the non-plan sale price exceeds the value of the liens, the absolute priority rule requires that a stockholder must pay a fair market price for the assets; or, the stockholder must make senior creditors whole, see ***Bank of America National Trust And Savings Association v. 203 North La Salle Street Partnership***, 526 US 434 (1999).

The Bankruptcy Court never reached a finding in its Sale Order that the price paid for the assets represented a fair market price according to the standard established for a stockholder in ***Bank of America National Trust And Savings Association***. This Court defined a fair price paid by a stockholder to be one in which the assets were exposed to the entire market and brought a fair market price. However, the sales agent hired to

advertise the Debtor's assets, Robert Schwartz, chose not to advertise the Debtor's assets to venture or financial capital [45] and only advertised to the Debtor's competitors [46], thereby exposing the assets to a limited market, and then only for the short period of six (6) weeks prior to the sale. In fact, the sales agent did not attract one bidder to the sale. The Stalking Horse entered into its purchase agreement on the petition date [47], weeks before the sales agent was hired to market the assets, and the only other bidder was the stockholder who testified it decided a month prior to the petition date that it would enter a bid [48]. The sales agent was completely ineffective in attracting even one bidder or in exposing the assets to the market at large.

The auction that did transpire was spoiled when both bidders rejected the assets and withdrew from the sale [49] after the stockholder committed perjury and failed to secure a good faith finding [50]. The standard under §363(f)(3) which

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[45] Bankruptcy Court docket # 245 - Transcript Oct. 27, 2003 Sale Hearing, pg. 64, ln. 17 - pg. 65, ln. 7 -.

[46] Bankruptcy Court docket # 245 - Transcript Oct. 27, 2003 Sale Hearing, pgs. 54 - 58.

[47] Bankruptcy Court docket # 121, - Debtor's Sale Motion, IMSI Purchase Agreement attached thereto as Exhibit A.

[48] Bankruptcy Court docket # 245 - Transcript Oct. 27, 2003 Sale Hearing, pg. 31, lns. 16 - 24.

[49] Bankruptcy Court docket # 245 - Transcript Oct. 27, 2003 Sale Hearing, pg. 52, ln.2 - 9 and pg. 68, ln. 5 - 22 -

[50] Bankruptcy Court docket # 245 - Transcript Oct. 27, 2003

the Bankruptcy Court used to establish that a fair price was paid only applies to determining if an outsider, like the Stalking Horse, paid a fair price. The same standard is not appropriate for establishing that a fair price was paid by a stockholder according to ***Bank of America National Trust And Savings Association***.

In our instant case the sales agent testified that the Debtor's assets were worth $8 mil. [51], and the Debtor testified its assets were worth $10 mil.[52] (for an average of $9 mil.). However the stockholder only paid $2.85 mil for the assets, which included over $500,000 in accounts receivable [53]. That means the stockholder only paid 28% of the value of the non-cash assets, which is a far cry from the definition of a fair price paid by a stockholder. The Court simply used the wrong standard when evaluating the fairness of the price paid for assets purchased by a stockholder at a non-plan sale.

The only statutory definition of "fairness and equity" appearing in all of the Chapter 11 codes is expressed as the absolute priority rule, which

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Sale Hearing, pg. 48 - 52.

[51] Bankruptcy Court docket # 245 - Transcript Oct. 27, 2003 Sale Hearing, pg. 63, ln. 9 - pg. 64, ln. 16.

[52] Bankruptcy Court docket # 243 - Transcript Nov. 6, 2003 Sale Hearing, pg. 21, ln. 17.

[53] Bankruptcy Court docket # 121 - Sale Order, pg. 3, ln. 2 – ln. 3.

should apply equally throughout Chapter 11 to cover both a plan of reorganization and a non-plan sale if both procedures are to be conducted fairly and equitably during Chapter 11. It is unfair and inequitable to let a stockholder dodge the reach of the absolute priority rule through a non-plan sale when senior creditors would never confirm the same sale under a plan of reorganization and when such a sale could not be crammed down against the objection of creditors, especially when the stockholder committed perjury when testifying about its arms length relationship and negotiations with the Debtor.

The Sale Order Is Void

A judgment is void and subject to relief under Federal Rule of Civil Procedure 60(b)(4) (hereafter "60(b)(4)") if the court's action amounts to a plain usurpation of power, see ***United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (1st Cir. 1990)**. A court may not render an order which transcends the limits of its authority. Furthermore, an order is void when it goes beyond the powers granted to the court by Congress, even where the court has jurisdiction over the parties and the subject matter. The lack of statutory authority to make a particular order or a judgment is akin to lack of subject matter jurisdiction and is subject to collateral attack. 46 Am. Jur. 2d, Judgments § 25, pp. 388-89. The Bankruptcy Court simply did not have the statutory authority necessary to convert White's Contract into an

unsecured claim through the non-plan sale. Additionally, according to ***Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)** the Sale Order is void because notice thereof via the Buyer's Purchase Agreement was not reasonably calculated to inform White of the true intentions of the Debtor and Buyer after they indicated they were assuming White's Contract immediately prior to the sale and then rejected White's Contract two (2) months after the sale.

The Sale Order is also void because it offends the conscience of justice. In ***Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)** this Court held that due process is violated "if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." The Sale Order is void and offends the principals of equity and justice because: 1) the Sale Order allowed a perjurious stockholder [54] to purchase all of the estate's $ 9

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[54] After committing perjury the Buyer withdrew from the sale and returned to Japan and did not attend the final day of the sale hearing to testify concerning its insider relationship with the Debtor or to litigate its limited objection to the sale in which the Buyer disclosed it owned portions of the Debtor software being sold - see Bankruptcy Court docket # 100 – Buyers Limited Objection to Sale, Software Development Agreement attached thereto as Exhibit A. The Buyer's objection to the sale and disclosure that it owned part of the software being sold created a deterrent against another buyer bidding for the assets, which explains why the Stalking Horse declined to bid at the auction or take the assets after winning

mil. in assets for only $ 2.85 mil. 2) in a direct sale to that stockholder rather than a fair market auction with competitive bidding, 3) when those assets were only selectively marketed for a short period of time, 4) leaving all of the $ 10 mil. in unsecured debt unpaid, 5) after Estate Counsel gorged on over $ 1 mil. in fees 6) which they promised as a dividend to creditors, 7) when no legal principal allowed such a sale to a stockholder unless consented to by creditors, 8) and instead of gaining that consent the Buyer required the estate to exhaust $250,000 of the only dividend available for creditors to indemnify the Buyer's perjury on appeal.

Fairness and equity dictate that if unsecured creditors are to be so totally decimated by this bankruptcy, getting nothing for their claims, then Estate Counsel and stockholders cannot deplete all the money and assets out of the estate while the Debtor's CEO maintains lucrative employment with the Buyer in exchange for facilitating such a windfall for all but unsecured creditors. "Our people" would be shocked and ashamed that such practices masquerade as justice. This bankruptcy provided nothing for unsecured creditors after all the assets were taken by the stockholder and all the cash was deplete by Estate Counsel. Surely this is not the Congressional intent behind the Bankruptcy Code.

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the bidding by default.

The sale served as nothing more than an expensive State Foreclosure Sale conducted under color of the Federal Bankruptcy system, being of no benefit to unsecured creditors, and was inapposite to the goal of the Bankruptcy Code which is to balance the equity between debtors and creditors.

White's 60(b)(4) Motion Was Ripe, Not Untimely

A 60(b)(4) motion may be brought at any time, see ***United States v. Boch Oldsmobile***, therefore, White's motion to vacate the Sale Order was not untimely per se. White's 60(b)(4) motion would normally be both moot and untimely under §363(m); however, the Buyer committed perjury at the auction and failed to secure a good faith finding and no one in this case is arguing that §363(m) bars White's 60(b)(4) motion.

White's 60(b)(4) motion is only limited in time by its reasonableness. Since §363(m) and the statute of limitations under Federal Rule 60(b) serve the same purpose of finality for good faith litigants, the Buyer's failure to secure those protections under §363(m) also foreclose a time bar to White's 60(b)(4) motion. It is not unreasonable to vacate the Sale Order, or in the alternative to order the Buyer to assume White's Contract when the Buyer gave notice it was assuming White's Contract in the first place.

White waited two and a half (2 & ½) years

after the sale to file his 60(b)(4) Motion because his initial appeal of the Sale Order was still pending and had not yet been denied by this Court. White did not sit on his rights, White diligently exercised his rights throughout this case. White had a motion, appeal, or writ pending every day of this case.

The Bankruptcy Court's Injunction Violates White's Right to Due Process

The Bankruptcy Court cites the four (4) prong procedure established in ***Cok v. Family Court of Rhode Island***, **985 F.2d 32, 34 (1st Cir. 1993)** for justifying a pre-filing injunction against a pro se litigant. Those prongs are: 1) The court must establish a sufficient record to support and justify the injunction, 2) The litigant must be warned of the injunction and be given an opportunity to oppose it, 3) There should be no reasonable alternative, and 4) The injunction must be narrowly construed so as to apply only to the problems identified by the Court. White addresses each of these criteria in turn.

1). Suffice it to say that if this Court finds that White's arguments on appeal regarding his Motion to Vacate or Administrative Expense Application are non-frivolous then the Bankruptcy Court's pre-filing injunction against White is without merit.

2). White was not given any warning of the

Bankruptcy Court's pre-filing injunction nor given an opportunity to oppose it. The Bankruptcy Court is required by case law and statutory law to issue an order to show cause and hold a hearing prior to issuing sanctions, which the Bankruptcy Court did not do.

3). The Bankruptcy Court had numerous alternatives to enjoining White. The Bankruptcy Court should have relied on its statutory power to sanction White under Federal Bankruptcy Rule 9011instead of enjoining White under the Court's inherent powers. The Bankruptcy Court's self-made procedure for enjoining White violates Rule 9011and did not provide White with the same standard of due process as Rule 9011. Rule 9011 requires the Bankruptcy Court to issue an order to show cause and hold a sanction hearing, as does the ***Cok v. Family Court of Rhode Island*** procedure, which did not occur in this instant case.

Additionally, it was the Chapter 7 Trustee who requested the injunction against White in the Trustee's opposition to White's Motion to Vacate [55], when such a request for sanctions must appear in a separate motion addressing only sanctions, according to Rule 9011(c)(1)(A). As a result, there is no record on appeal documenting White's response to an order to show cause or record of

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[55] Bankruptcy Court Docket # 750 - Trustee's Opposition to White's Motion to Vacate, pg. 8, pp. 18.

arguments at an injunction hearing.

4). The injunction is too broadly fashioned and amounts to a total ban against White filing even a meritorious pro se motion. First, the Bankruptcy Court's injunction has no provision for reviewing White's pro se filings before they are stricken by the clerk to determine which motions might be meritorious; therefore, even meritorious pro se motions filed by White are banned by the Bankruptcy Court. Second, the Bankruptcy Court requires White to file through an attorney and then threatens to sanction any attorney White hires to litigate his administrative claim or property interest [56]. No attorney in Massachusetts would represent White under such a threat. This threat created a filing restriction in the injunction with which White could not possibly comply, thereby violating White Constitutional Right "to petition the government for a redress of grievances".

Summary

The Debtor paid White's royalties during the five (5) years pre-petition in the ordinary course of the Debtor's business. White's Contract remained valid after the petition date and the Debtor alone chose to continue selling software permitted under White's Contract, in the Debtor's ordinary course of

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[56] Bankruptcy Court docket # 782 - Transcript Motion to Vacate Hearing, April 25, 2006, Judge Boroff's closing remarks, pg. 16, Lns. 1-3.

business, which benefitted the estate, therefore White is entitled to priority of his administrative claim. The mistake by the Bankruptcy Court in categorizing White's royalties as a pre-petition claim caused the Bankruptcy Court to disregard White's property interest in the Debtor's assets, allowing the Buyer to "take" White's property without proper notice or just compensation. However, once the Debtor elected to sell all its assets through a non-plan sale then the provisions in §363(f) governed the Debtor's assets and White's interest in them and required that specific performance was the remedy for the Debtor's breach of White's Contract because damages could not be calculated with certainty.

Accordingly, specific performance requires that White's Contract assigns to the Buyer through its assignment clause. Furthermore, §363(f)(5) allows a contested non-plan sale if such a sale could be "crammed down" under a plan of reorganization, which means the absolute priority rule is applicable to Chapter 11 non-plan sales and requires a stockholder of the Debtor, such as the Buyer, to pay a fair market price for the assets, or make dissenting senior creditors whole. Finally, once the Buyer notified White that the Buyer was assuming White's Contract four (4) days prior to the sale, and then the Debtor and Buyer rejected White's Contract two (2) months after the sale, such faulty notice violated White's right to due process, which in turn voids the application of the Sale Order in regards to White's property interest.

Therefore, White's Contract survives the bankruptcy and assigns to the Buyer.

The meritorious consequence of these arguments is a compelling demonstration that the Bankruptcy Court's pre-filing injunction against White is unwarranted and should be vacated.

White's Writ Should Be Granted

White's Writ of Certiorari should be granted because Federal Bankruptcy, District, and Circuit Courts consistently (and incorrectly) categorize non-executory contracts as automatically converting to pre-petition claims, exempt from administrative priority and disqualified as a property interest in the debtor's assets without evaluating the terms of those contracts on a case by case basis. There is nothing in the Bankruptcy Code, except the self-made rules practiced by the lower Courts, which leads to the conclusion that non-executory contracts automatically and exclusively "default" into unsecured pre-petition status, exempt from qualification under §503(b)(1(A) and §363(f).

Respectfully submitted on this 9th day of November 2007, by

Robert White

Robert White – pro se
P.O. Box 488, Boise City, OK 73933
Ph: (580) 544-3736

81

Supreme Court, U.S.
FILED
(2)
07-949 NOV 13 2007
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

ROBERT WHITE, PRO SE,

Petitioner;

v.

JOSEPH B. COLLINS,
Chapter 7 Trustee for
CK LIQUIDATION CORP,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the First Circuit

PETITIONER'S APPENDIX

Robert White - pro se
Box 488
Boise City, OK 73933
(580) 544-3736

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JUDGMENT
Of
THE FIRST CIRCUIT COURT OF APPEALS,

Entered on June 29, 2007

United States Court of Appeals
For the First Circuit

No. 06-2423

IN RE: CK LIQUIDATION CORPORATION,

Debtor.

ROBERT WHITE,

Appellant,

v.

JOSEPH B. COLLINS, CHAPTER 7 TRUSTEE,

Appellee.

Before

Boudin, Chief Judge,
Lynch and Howard, Circuit Judges.

JUDGMENT

Entered: June 29, 2007

We have carefully reviewed the record in this case, including the briefs of the parties. We affirm the judgment of the bankruptcy court, essentially for the reasons given in order and the memorandum of

decision, dated May 9, 2006. We add only the following.

The record indicates that White was given prior notice of the sale of debtor's assets and the opportunity to challenge that sale. Hence, any claim that the sale violated his right to due process is without foundation.

White's claim arises from a prepetition transaction with debtor for royalty payments, not from a postpetition transaction with the trustee or debtor in possession. Hence, it does not qualify as an administrative expense under Section 503(b) of the Bankruptcy Code. In re FBI Distribution Corp., 330 F.3d 36, 42 (1st Cir. 2003); see also In re Waste Systems, 280 B.R. 824, 828 (Bankr. D. Del. 2002) (royalty payments not administrative claims).

Finally, the order limiting White's ability to file further actions in this case is well supported by the record and properly crafted to prevent further inappropriate filings in this case.

Affirmed.

By the Court:

Richard Cushing Donovan, Clerk.

By: /s/ MARGARET CARTER
Chief Deputy Clerk.

[cc: Robert White, Christopher M. Candon, Esq. and Michael J. Goldberg, Esq.]

MEMORANDUM OF DECISION AND ORDER
And
JUDGMENT
Of
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS,

Entered on August 28, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-40114-RWZ

IN RE: CK LIQUIDATION CORPORATION

ROBERT WHITE
v.

CHAPTER 7 TRUSTEE JOSEPH B. COLLINS

MEMORANDUM OF DECISION AND ORDER

August 28, 2006

ZOBEL, D.J.

Appellant Robert White appeals, pro se, from two orders entered by the United States Bankruptcy Court on May 9, 2006. The first order—the "Administrative Expense Order"—denied appellant's claim for administrative expense priority under 11 U.S.C. §§ 503(b) and 507(a)(1). The second order—the "Motion to Vacate Order"—denied appellant's second Motion to Vacate the Sale Order and enjoined appellant from filing any further papers, pleadings, or documents in the Chapter 7 case, with two narrow exceptions. With respect to the Administrative Expense Order, the Bankruptcy Court correctly concluded that appellant's claim was a prepetition claim arising out of a prepetition contract, and that the contingency of certain payments on postpetition sales did not transform the claim into an

administrative expense. Appellant's claim was thus not entitled to priority. See In re FBI Dist. Corp., 330 F.3d 36, 48-49 (1st Cir. 2003). Nor was it improper for the Bankruptcy Court to deny appellant's second Motion to Vacate the Sale Order, which was nothing more than an attempt to relitigate—for the third time—the propriety of the Sale Order. (See Appellee's Br. 4-12 (setting forth lengthy procedural history of the bankruptcy case).) The record reveals no merit in appellant's claim that the entry of the Sale Order violated due process. Moreover, appellant's motion—filed over two and one-half years after entry of the Sale Order—was untimely. See Fed. R. Civ. P. 60(b) (requiring motions pursuant to Fed. R. Civ. P. 60(b)(4) to "be made within a reasonable time"). Finally, in light of appellant's excessive filings and abusive motion practice, the Bankruptcy Court's decision to bar appellant from filing additional papers, except in two narrow circumstances, was well within its discretionary power "to regulate the conduct of abusive litigants." Cok v. Family Court of R.I., 985 F.2d 32, 34 (1st Cir. 1993) (per curiam).

Accordingly, both Orders of the Bankruptcy Court are affirmed.

_____ /s/Rya W. Zobel
DATE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: CK LIQUIDATION CORP.

ROBERT WHITE

v. CIVIL ACTION NO. 06CV40114-RWZ

CHAPTER 7 TRUSTEE JOSEPH B. COLLINS

JUDGMENT

ZOBEL, D.J. August 28, 2006

In accordance with the Memorandum of Decision and Order dated 8/28/06 affirming the ruling of the bankruptcy court; it is hereby ORDERED:

CASE DISMISSED.

By the Court,

s/ Lisa A. Urso
Deputy Clerk

MEMORANDUM OF DECISION

By

THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS,

Entered on May 9, 2006

United States bankruptcy Court
District of Massachusetts

In Re:	)	CHAPTER 7
	)	Case No.
CK LIQUIDATION CORPORATION (f/k/a CADKEY CORPORATION	)	03-44906- HJB
Debtor	)	

MEMORANDUM OF DECISION

Before this Court is a request by Robert White ("White") – a creditor and frustrated bidder for the assets of CK Liquidation Corporation (then known as CADKEY Corporation) (the "Debtor") – that this Court vacate its order of November 6, 2003, authorizing a sale of substantially all of the Debtor's assets to Kubotek Corporation. Styled as a "Motion to Vacate Sale Order," the title conveys no hint that White actually asks this Court to reconsider its previous denials of the same request for relief. White has attempted to reverse the sale to Kubotek Corporation since November of 2003, taking his arguments to this Court, the United States District Court for the District of Massachusetts, the First Circuit Court of Appeals and the United States Supreme Court. His efforts have borne no fruit. But he has succeeded in dissipating assets of the bankruptcy estate, forcing estate functionaries to oppose each of his frivolous requests and appellate ventures. A more complete history of these events was catalogued by this Court in Its Memorandum of Decision dated march 20, 2006, in explanation of its order of the same date, denying White's request to proceed in forma pauperis with regard to yet another

appeal. See In re Ck Liquidation Corp., 339 B.B. 283 (Bankr. D. Mass. 2006).

In order to deal with the untimeliness of the present motion (hereafter, the "Motion to Vacate"), White cloaks his arguments within Rule 60(b)(4)[1] of the Federal Rules of Civil Procedure. That rule provides that a party may seek relief from a final order if "the judgment is void," but provides so specific time limitation for the bringing of such a request. However, the motion must be made "within a reasonable time." Fed. R. Civ. P. 60(b). As for his underlying arguments, White raises two types. First he notes that his claim against the Debtor is for royalties arising from a pre-petition contract under which he had sold certain intellectual property to the Debtor. White says that because his contractual rights to the royalties were not "executor" within the meaning of 11 U.S.C. §365, they could not be rejected; therefore, his right to royalties could not be converted into a "claim" under 11 U.S.C. §501 without "notifying White which of the provisions of §363(f)(1-5) converted White's contract into a claim, when in fact none do..." Because no such notice was given, White maintains, he was denied due process. Second, he argues that the sale offended "conscience and justice," "violated

---

[1] Federal rule (60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons:
>
> ...
>
> (4) the judgment is void....
>
> ...
>
> The motion shall be made within a reasonable time....

Subject to exceptions not here relevant, Federal Rule 60 applies in bankruptcy cases. See Fed. R. Bankr. 9024.

[his] interest in the Debtor's property," left his "interest intact," and violated the "absolute priority rule."

The Chapter 7 trustee (the "Trustee") and Kubotek Corporation have each opposed the Motion to Vacate. Their objections are well made. White's arguments simply lack merit.

A Federal Rule 60(b)(4) motion must be made within a reasonable time. The Present Motion to Vacate was not. Over two and one-half years have passed since the issuance of the challenged order. White never obtained a stay pending appeal. Undoubtedly, the assets have now become well integrated into Kubotek's business. None of the issues raised by White is newly discovered. They have either been raised in some form and denied, or could have been raised as early as the sale hearing itself and were not. Morever, "[a] judgment is not void merely because it is or may be erroneous... [a] a judgment is void, and therefore subject to relief under Rule 60(b)(4), only if the court lacked jurisdiction or in circumstances in which the court's action amounts to a plain usurpation of power constituting a violation of due process." United States v. Boch Oldsmobile. Inc., 909 F.2d 657 (1st cir. 1990). There is no question that the Court had jurisdiction to enter the sale order and now has jurisdiction to determine White's claim, if any. See 28 U.S.C. §157(b)(2)(B) and (N).

White's underlying arguments have no greater force of reason. The parties agree that the contract between White and the Debtor was not executory. Accordingly, White's claim for royalties, if any, is a general unsecured claim, [2] and he was entitled to no

---

[2] White's equally frivolous motion to have his claim treated with administrative priority under 11 U.S.C §507 has been denied by order of even date.

specific notice that his claim would be so treated, any more than any other unsecured creditor was entitled to notice of the treatment of its claim. It is not disputed that White was given timely notice of the sale. Indeed, his then attorney attended the sale hearing and objected on other grounds. White's reference to the absolute priority rule is misplaced. The "absolute priority rule" is a colloquialism describing the right of a debtor to have a Chapter 11 plan confirmed over the objection of a dissenting class of unsecured creditors by meeting a condition described in 11 U.S.C. §1129(b)(2(B)(ii). The Absolute priority rule has no application here, as the Debtor's assets were sold under §363 of the Bankruptcy Code, and not pursuant to a Chapter 11 plan. White's remaining arguments are equally meritless, being derivative of those made in connection with White's previous efforts to have the sale vacated, which arguments have been considered and rejected by this Court and those courts on review.

Tor these reasons, White's motion to Vacate must be denied. But, in his opposition, the Trustee asks for more. The Trustee notes the plethora of motions, oppositions, responses and other papers filed by White and asks the Court to stop this abuse of and interference with the estate's administration. This is not the first such request by the estate's representative. Earlier in the case, the predecessor Chapter 7 trustee asked the Court to bar further fillings by White. See In re Ck Liquidation, 339 B.R. at 288. This Court was reluctant to elect that option when first presented, viewing such a bar as a drastic remedy and satisfied that White's actions could be controlled by resort to Bankruptcy Rule 9011, if necessary. [3] id. This Court

---

[3] Federal Rule of Bankruptcy Procedure 9011 requires pro se parties to sign motions and other pleadings filed with the court.

was wrong. The subsequent travel of this case has demonstrated White's success to date in shielding himself from such orders. He has declined to pay monetary sanctions issued for Bankruptcy Rule 9011 sanctions, declaring himself judgment-proof. [4] He has largely ignored orders holding him in contempt of court and has even tolerated incarceration, notwithstanding his ability to pay the rather modest sanctions ordered by this Court to date. In fact, he continued to file papers while incarcerated. This Court has already determined that "the various forms of relief requested by White have long ago moved beyond the frivolous to the malicious and vexatious." Id.

The Court can not allow White to continue punishing the estate functionaries for his lost opportunity to purchase the Debtor's assets. Current

---

See Fed R. Bankr. P. 9011(a). By their signature, the party represents that the filed paper "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, -

> (1)[ ] is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfirvolous argument for the extension, modification, or reversal of existing law or the establishment of a new law;
>
> ....

Fed. R. Bank. R. 9011(b)(1) and (2). If the Court finds that bankruptcy Rule 9011(b) has been violated, it may issue appropriate sanctions to deter further violation of the rule See Fed. R. Bankr. P. 9011(c).

[4] Notwithstanding his claims of poverty, White has managed to travel routinely from California to Massachusetts to attend hearings.

circumstances require this court to adopt the approach urged by the Trustee. However, such an approach must be geared to protecting the estate from White's machinations while still preserving his rights. Three distinct question must be addressed. Does a court have the authority to bar a creditor from filing papers? How should such an order be crafted? And how should such an order be enforced? The court turns to each of these in turn.

It is well-settled that a federal court may, in appropriate circumstances and with a well-tailored order, prospectively bar an abusive pro se litigant from filing papers. "Federal courts plainly possess discretionary power to regulate the conduct of abusive litigants." Cok. V. Family Court of Rhode Island, 985 F.2d 32, 34 (1st Cir. 1993); Castro v. United States, 775 F.2d 399, 408 (1st cir. 1985); Pavilonis v. King, 626 F.2d 1075, 1079 (1st Cir. 1980), cert. denied 449 U.S. 829 (1980). A sufficient record must be established to support and justify such an order. Cok, 985 F.2d at 35. And the restrictions must not be of unlimited breadth. Id. They must be tailored to deal with the problems identified by the Court.

Here, the Court has already established a record of actions by white that more than justify and, indeed, mandate a judicial response. See In re Ck Liquidation, 339 B.R. 283. White was served with the Trustee's request for a bar against filings. See "Objection of Chapter 7 Trustee to Robert White's Motion to Vacate Sale Order," par. 18. [5] He had an opportunity to speak to that request at the hearing on the Motion to Vacate, but failed to do so. There is no reasonable alternative

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[5] In fact, White also had notice of this Court's regret at not having issued an order when first requested by the predecessor Chapter 7 Trustee. In re CK Liquidation, 339 b.R. at 288, n. 12.

to such restrictions. Monetary sanctions have been ignored. Contempt sanctions have been ineffective.

This Court is left to craft a restriction that will minimize impediments to White's access to the federal court, while still maximizing protection for the estate against a further dissipation of estate assets. First, any restriction should apply only to filings which are made pro se. Presumably, an attorney will be more wary of filing a frivolous pleading found to be a violation of Bankruptcy Rule 9011 and the Court will be more effective in enforcing sanctions. Second, the restriction should apply only to requests for relief relative to this estate. There is no evidence that White has acted abusively or is even a party in any other case. Third, it would be inappropriate were this Court to restrict White's defense with respect to any matter where he is involuntarily drawn into a dispute as a named respondent or defendant. And fourth, this Court should not and can not, restrict any filing which are incident to an appeal by White from any order of this Court.

Accordingly, this court will bar White from filing, pro se, any papers in this Chapter 7 case, except those which relate to: 1) any matter in which he is a named respondent or defendant, or 2) an appeal of any order of this Court.

Finally, this Court has already complained of its difficulty enforcing its orders designed to reduce frivolous filings by White. Any order which simply enjoins White from filing such papers is subject to the same infirmities. Presently, the Clerk of this court must accept all papers submitted - and, upon their filing, other parties are compelled to respond. The court must break that cycle. Accordingly, the court will order that, upon the filing of any paper by White which violates the terms of the restrictions set forth above, the Court will strike the papers with the following

endorsement: "Struck in accordance with Court order dated May 9, 2006." A response by any other party in the case shall be excused. Furthermore, upon entry of any such order striking a paper filed by white in accordance herewith, the Court shall accrue, without further order or hearing, an automatic sanction of $1,000, payable to the Trustee on behalf of the estate. Those sums will accrue until the Trustee requests calculation of a final liquidated amount. Once liquidated, the Trustee shall first offset such amount against any dividend payable to White on account of any claim which he may have in the case, and then either collect or sell the remaining obligation in accordance with 11 U.S.C. §363.

CONCLUSION

It is the obligation of the courts of the United States to provide free and open access to those who seek relief under the Constitution and the laws of the United States. It is the concomitant obligation of those courts to protect the integrity of their processes from those who would abuse the courts to further their improper ends.

The Motion to Vacate Sale Order, filed by Robert White is DENIED. Rest5rictions, as described above, will be put in place to reduce his opportunity for filing frivolous papers in the future.

An order will issue forthwith in conformity with this Memorandum of Decision.

DATED: May 9, 2006 /s/ Henry Jack Boroff
Henry J. Boroff
United States Bankruptcy Judge

ORDER
By
THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS,

Entered on May 9, 2006

United States bankruptcy Court
District of Massachusetts

In Re:	) CHAPTER 7
	) Case No.
CK LIQUIDATION CORPORATION (f/d/a CADKEY CORPORATION	) 03-44906- HJB
Debtor	)

ORDER

WHEREAS, on or about April 1, 1998, Baystate Technologies, Inc. (the predecessor of CK Liquidation Corporation f/k/a Cadkey Corporation [the "Debtor"]) entered into an agreement with FastSURF, Inc., Robert White and David Reyburn whereby Baystate acquired certain computer software and agreed to pay White and Reyburn royalties on subsequent sales of software products incorporating the purchased software (the "Acquisition Agreement"); and

WHEREAS, on August 22, 2003 (the "Petition Date"), the Debtor filed a petition under Chapter 11 of the United States Bankruptcy Code and, on March 4, 2004, the case was converted to a case under Chapter 7; and

WHEREAS, by order of November 6, 2003, this Court approved a sale of substantially all of the Debtor's assets, which sale closed on or about December 3, 2003; and

WHEREAS, White claims to be owed monies due under the Acquisition Agreement for royalties which accrued both before and after the Petition Date through the closing of the sale; and

WHEREAS, White has filed an "Application for Payment of Priority Administrative Claim" (the "Application") and maintains that:

1. the Acquisition Contract is not an executory contract within the meaning of 11 U.S.C.§365 [1]; and
2. the estate derived a post-petition benefit from its post-petition sales employing the software obtained under the Acquisition Agreement, and therefore White is entitled to an administrative claim under 11 U.S.C. §§ 503(b) [2] and 707(a)(1);[3] and

---

[1] The parties agree that the Acquisition Agreement was not executory and, in the light of the fact that the transfer of the software was completed pre-petition and only the payment obligation remained, the Court agrees with their conclusion.

[2] 11 U.S.C. §503(b), as applicable to the instant case (filed filed prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005), provides:

> ...
>
> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for the services rendered after the commencement of the case;
>
> ....

[3] 11 U.S.C. §507(a)(1), as applicable to the instant case, provides:

> (a) The following expenses and claims have priority in the following order:
>
> (1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.
>
> ....

WHEREAS, the chapter 7 trustee opposes the Application and maintains that royalty payments due, if any, are general unsecured claims against the estate and are not entitled to administrative priority; and

WHEREAS, it is well-settled that "for a claim to qualify as an administrative expense under subsection 503(b)(1), (1) it must have arisen from a transaction with the trustee or debtor in possession, rather that from a prepetition transaction with the debtor, and (2) the consideration supporting the claim must have benefitted the estate in some demonstrable way." Mason v. Official Comm. Of Unsecured Creditors (In re FBI Distrib. Corp., 330 F.3d 36, 42 (1st Cir. 2003)(emphasis added); see also Cramer v. Mammoth Mart. Inc. (In re Mammoth Mart. Inc.), 536 F.2d 950, 954 (1st Cir. 1976); and

WHEREAS, White was not engaged in any post-petition transaction with the Debtor; rather, he claims only that his pre-petition transaction with the Debtor benefitted the post-petition estate;

Now, therefore, the Court FINDS AND RULES that White has failed to establish priority under §§ 503(b) and 507(a)(1). Accordingly, the "Application for Payment of Priority Administrative Claim" is DENIED.

DATED: May 9, 2006 /s/ Henry Jack Boroff
Henry J. Boroff
United States Bankruptcy Judge

ORDER
By
THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS,

Entered on May 9, 2006

United States bankruptcy Court
District of Massachusetts

In Re:	)	CHAPTER 7
	)	Case No.
CK LIQUIDATION CORPORATION (f/d/a CADKEY CORPORATION	)	03-44906- HJB
Debtor	)	

ORDER

For the reasons set forth in this Court's Memorandum of Decision of even date:

1. the "Motion to Vacate Sale Order," filed by Robert White ("White") on March 15, 2006 is DENIED; and

2. White is RESTRAINED AND ENJOINED from filing, pro se, any further papers, pleading and documents in this case (an "Excluded Paper"), excepting only an otherwise Excluded Paper which relates to:

    a. a contested matter or adversary proceeding in which he is a named respondent or defendant; or

    b. an appeal of an order of this Court; and

3. in the event that White should, in violation of Paragraph 2 of this Order, file an Excluded Paper:

a. the Excluded Paper will be struck with an endorsement of "Struck in accordance with Court's order dated May 9, 2006," and all other parties in interest shall be excused from responding thereto; and

b. White will be sanctioned in the amount of $1,000.00 for each Excluded Paper filed,[1] without further order or hearing, payable to the Trustee on behalf of the estate, such sums to accrue until Trustee requests a calculation of a final liquidated amount and then collected as follows:

(i) first offset against any dividend payable to White on account of any claim which he may have in the case; and

(ii) the balance incorporated in an order and judgment which may be collected by the Trustee or sold in accordance with 11 U.S.C. §363.

DATED: May 9, 2006 /s/ Henry Jack Boroff
Henry J. Boroff
United States Bankruptcy Judge

[1] A multi-page document will be treated as a single Excluded Paper.

FIRST CIRCUIT COURT OF APPEALS
Docket for Case
Showing

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION,

Entered on August 14, 2007

United States Court of Appeals
For the First Circuit

No. 06-2423

IN RE: CK LIQUIDATION CORPORATION,

Debtor.

ROBERT WHITE,

Appellant,

v.

JOSEPH B. COLLINS, CHAPTER 7 TRUSTEE,

Appellee.

Before
Boudin, Chief Judge,
Lynch and Howard, Circuit Judges.

ORDER

Entered: August 14, 2007

Appellant's "motion for reconsideration or clarification" of this court's judgment, dated June 29, 2007, is denied.

By the Court:

Richard Cushing Donovan, Clerk.

By: /s/ MARGARET CARTER
Chief Deputy Clerk.

[cc: Robert White, Christopher M. Candon, Esq. and Michael J. Goldberg, Esq.]

PETITIONER'S CONTRACT

With

Pre-Petition Debtor

BAYSTATE TECHNOLOGIES, INC.
d.b.a.
CADKEY CORPORATION

ACQUISITION AGREEMENT

AGREEMENT dated of this 1st day of April, 1998, by and between BAYSTATE TECHNOLOGIES, INC. ("Purchaser"), a Massachusetts corporation, with a place of business at 33 Boston Post Road West, Suite 420, Marlborough, MA 01752, FastSURF, Inc. ("Seller"), a California corporation, with a place of business at 30 South Washington Street, Sonora, California 95370, Robert White, an individual and principal shareholder of Seller, residing in Sonora, California ("White"), and David Reyburn, and individual residing in Goshen, Indiana ("Reyburn").

WITNESSETH

WHEREAS, Seller, White and Reyburn desire to sell and Purchaser desires to acquire certain of the assets, business and properties of Seller used in connection with Seller's mechanical CAD (computer aided design) software business hereinafter specified.

NOW, THEREFORE, the parties hereto agree as follows.

ARTICLE I
PURCHASE AND SALE

Section 1.01. Closing. The closing (the "Closing") of the transactions set forth herein shall

take place at 9:00 A.M. on or about April 2, 1998 in Worcester, Massachusetts or at such other time and place as Purchaser and Seller may agree. (Hereinafter, the date on which the Closing shall take place is referred to as the "Closing").

Section 1.02. Purchased Assets. Effective as of the Closing:

(a) Seller, White and Reyburn, jointly and severally, except as hereinafter provided, hereby do convey, transfer, assign and deliver, or cause to be conveyed, transferred, assigned and delivered, to Purchaser the following assets and properties used and owned or held by Seller, White and Reyburn (the "Purchased Assets"):

(1) the software known as FastSURF and FastSOLID, including source code, object code, screen displays, interfaces and all other components (hereinafter the "Purchased Software"), and all of Seller's, White's, and Reyburn's rights therein, whether intellectual property rights, trade secret rights or otherwise, and Seller's, White's and Reyburn's rights in all foreign translations of the Purchased Software;

(2) all of the contracts with respect to the Purchased Software, (including licenses and distributorship agreements, with exception of any l8icense agreement between Seller and Spatial Technology, Inc. (hereinafter the "Included Contracts");

(3) all of the customer contracts with respect to the Purchased Software (annual update, annual update/upgrade or tech support contracts) for both active and inactive customers, a complete list of which is set forth on Schedule 1.02-3;

(4) the complete list of customers of Seller and end users of the Purchased Software and set forth on Schedule 1.02-4;

(5) all of Seller's, White's and Reyburn's copyrights, copyright registrations, copyright applications, and copyright licenses, with respect to the Purchased Software;

(6) all manuals, technical descriptions, user guides and documentation, in electronic and hard copy form, of the Purchased Software in Seller's possession or control, as are being delivered to Purchaser on the Closing and all of Seller's copyright, copyright registrations, copyright applications, and copyright licenses with respect thereto;

(7) all trademarks and trade names, trademark registrations and trademark applications and any other trademarks used with respect to the Purchased Software (hereinafter referred to as the "Trademarks") and all of the good will associated with such Trademarks;

(8) all patents, and patent applications related to the Purchased Software;

(9) all inventory of the Seller as of the Closing;

(10) all of the books and records that relate solely to the Purchased Software, and copies of such other of Seller's books and records relating to the Purchased Software as Purchaser may reasonably request prior to Closing.

(b) Such conveyance, transfer, assignment and delivery shall be further effected by such assignments, deeds, bills of sale and other instruments as shall be reasonably requested by Purchaser. With the exception of royalties payable under Section 1.04 hereof, Seller, White and Reyburn, jointly and severally, retain no interest in the Purchased Software. Any reference in Section 1.02(a) to a Schedule on which are listed the assets transferred in a particular category, shall not limit the generality of the Seller's, White's and Reyburn's obligation to transfer, and Purchaser's purchase of the entire asset category including items not scheduled for any reason.

Section 1.03. Excluded Assets. The Purchased Assets shall not include any equipment, property or other assets not listed in Section 1.02.

Section 1.04. Purchased Price and Payment. Purchaser agrees that in full payment of

the purchase price for the assets, business and properties acquired, and the other rights granted, hereunder in each case as specifically provided herein, including all such rights whether owned individually, jointly, or in any combination, by Seller, White or Reyburn or any subsidiary, or related entity or person ("Affiliate") of any one or more of them:

(a) Purchaser will pay royalties on a quarterly basis equal to five percent (5%) of Purchaser's net product sales per quarter for (a) sales of Purchasers CADKEY® product, (b) sales of separate copies of the Purchased Software, and sales of future products which are incorporated in products set forth in either (a) or (b) of the foregoing (hereinafter "Product Sales"), where such Product Sales occur during the period beginning with the first day following the closing and ending on the first to occur of (i) the seventh anniversary of the Closing or (ii) Purchaser shall have paid to the persons identified Section 1.04(b) a total of $5,000,000.00 in royalties determined pursuant to this Section 1.04(a) or payments in lieu thereof. For purposes of calculating any such Royalties due hereunder, Product Sales shall be Purchaser's net sales as determined by generally accepted accounting principles, consistently applied and shall include all sales whether made by Purchaser or any subsidiary, related entity or person or any other affiliate of Purchaser or any such related or affiliated entity or person (hereinafter "Affiliate"). To the extent that it would result in double counting, gross product sales shall not include transactions solely between

Purchaser and Affiliates that are not end users of the products sold. Royalties shall be paid quarterly within thirty (30) days following the end of each calendar quarter, starting with respect to the calendar quarter that ends on June 30, 1998;

(b) In full satisfaction of the purchase price as determined in Section 1.04 (a) above, Purchaser shall pay simultaneously to each of (i) Seller (or Seller's designee as set forth on Schedule 1.04-(b)), and (ii) Reyburn one half of the amount determined under Section 1.04(a) (or 2.5% Purchaser's Product Sales), such payments together to total the amount determined under Section 1.04(a).

Section 1.05. No Assumed Liabilities. Purchaser does not assume, agree to pay, perform or discharge any liabilities of Seller, White or Reyburn, whether incurred prior to or following the Closing. Notwithstanding the foregoing, Purchaser will assume and agree to perform all existing annual update (upgrade) contracts for the Purchased software which have not expired as of the closing and the Included Contracts. Seller will have delivered to Purchaser on or prior to the Closing a complete and accurate list in all material respects of all such Included Contracts. Except for any liability or obligation referred to in the preceding sentence, Purchaser has not agreed to pay, shall not be required to assume and shall not have any liability whatsoever of Seller, White or Reyburn.

Section 1.06. Delivery. With respect to the Purchased Software, as soon as possible prior to the Closing, Reyburn will deliver an original and one back-up copy on CD ROM of each Pursed Software identified on Schedule 1.02-1 to counsel to Purchaser who shall serve as escrow agent (hereinafter referred to as the "Escrow Agent"). Purchaser shall be permitted to inspect and test the Purchased Software prior to Closing to its satisfaction. Prior to Closing, Seller, White and Reyburn shall retrieve all originals and all copies of the Purchased Software, inventory, customer lists, maintenance databases, end user identification wherever physically located, for delivery to Purchaser at Closing. Seller, White and Reyburn will reasonably satisfy Purchaser that no additional copies of the Purchased Software, customer lists, maintenance database or end user identification remain in the possession of Seller or any third party. The Escrow Agent shall deliver the Purchased Software to purchaser at the Closing.

Section 1.07. Hold Harmless Against Unpaid Creditors. Seller shall on or before the Closing pay in full all creditors of Seller except for those who have not rendered a final bill or with respect to which Seller is duly contesting the validity or appropriateness of any invoice or claim. Seller hereby indemnifies and holds Purchaser harmless form any and all claims of creditors of Seller for any obligations arising at any time prior to or following the Closing.

Section 1.08. Change of Name. Seller will change its corporate name effective not later than 30 days after the Closing to exclude the use of the Words "FastSURF" and "FastSOLIDS" in such name.

Section 1.09. Audit. Purchaser shall maintain complete and accurate records of its sales sufficient to permit the determination of the amounts payable under section 1.04 to Seller. Purchaser shall, upon fourteen (14) days advance written notice received from Seller, but not more frequently that once in any calendar year, permit reasonable inspection of such records by Seller's outside accountants at the office of Purchaser during normal business hours, all at Seller's expense. Seller and its accountants shall maintain in confidence and not disclose to third parties any of the information contained in or derived from the records inspected during such audits without the prior written consent of Purchaser.

ARTICLE II
REPRESENTATIONS AND WARRANTIES OF SELLER

Seller, and where indicated White and Reyburn, represent and warrant to Purchaser that:

Section 2.01. Organization and Good Standing. Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of California, and Seller has the

corporate power and authority to enter into this Agreement and carry out the transactions hereby contemplated.

Section 2.02. Corporate Authorization. Seller has taken or by the Closing will have taken all corporate action required to be taken by it to authorize the execution and delivery of the Agreement and the agreements to be executed and delivered by it hereunder (together with this Agreement the" Seller's Documents") and the transactions hereby and thereby contemplated. Seller has or by the Closing will have the corporate power and authority to execute and deliver Seller's Documents and to consummate the transaction thereby contemplated and to take all other actions required to be taken by it pursuant to the provisions thereof; and this Agreement is, and the other Seller's Documents on the Closing will be, valid and binding upon and enforceable against Seller in accordance with their respective terms subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws and the availability of equitable relief. Neither the execution and delivery of Seller's Documents nor the consummation of the transactions thereby contemplated will constitute any violation or breach of the Certificate of Incorporation or the other instrument to which Seller is a party or any order, writ, injunction, decree, statute, rule or regulation, or will result in the creation of any lien on any of the assets or properties of Seller.

Section 2.03. Title. Seller, White and Reyburn have (or will at the Closing have), and will transfer to Purchaser at the Closing, good and marketable title to all of the Purchased Assets transferred pursuant to this Agreement, in each case free and clear of all liens and encumbrances. Seller, White and Reyburn, either individually or jointly, own each of the Purchased Software, free and clear of all liens and encumbrances. Neither Seller, White or Reyburn has granted to any individual, firm, partnership, corporation, association or other entity any interest in any of the Purchased Software or Purchased Assets, by license or otherwise.

Section 2.04. Contracts. Included Contracts include, but are not limited to , all confidentiality and non-compete agreements relating to the Purchased Software entered into by Seller, White or Reyburn with respect to the Purchased Software with any third party, all existing development, distribution, license and royalty agreements relating to the Purchased Software, and all warranty agreements in effect with respect to the Purchased Software. To the best of Seller's, White's, and Reyburn's knowledge, each Included Contract is valid, binding and enforceable in accordance with its terms, and is in full force and effect. Neither Seller, White or Reyburn is in material default under any material Included Contract and no event has occurred thereunder, which with the lapse of time or the giving of notice would constitute such a material default, and to the knowledge of Seller, White or Reyburn, no other party to any such material

Included Contract is in material default thereunder. Each such Included Contract is assignable to Purchaser without the consent of any third party, and no such Contract requires the consent of any other party thereto to the transactions hereby contemplated.

Section 2.05. Governmental Approvals. No authorization, approval, order, license permit, franchise, or consent and no registration, declaration or filing by or with any domestic or foreign governmental authority is required in connection with the execution and delivery by Seller of this Agreement and the consummation by Seller of the transactions as contemplated hereby.

Section 2.06. Intellectual Property. Seller, White and Reyburn, either individually or together, own the registered and unregistered copyrights to all of the Purchased Software. None of the Purchased Software constitutes a derivative work for purpose of the United States copyright laws of any work the copyright of which is owned at Closing by persons other than Seller, White or Reyburn. Seller owns the registered and unregistered Trademarks. To the best knowledge of Seller, White and Reyburn, none of the Purchased Software and the Trademarks infringes on the intellectual property rights of any third party. Neither Seller, White or Reyburn has not received any notification of infringement by it in connection with the Purchased Software of any intellectual

property rights of third parties. To the best knowledge of Seller, White and Reyburn, no third party is infringing on the rights in or to the Purchase Software of the Trademarks.

Section 2.07. Trade Secret. All of the Purchased Software constitutes a trade secret of Seller, White or Reyburn and each of them has taken all reasonable and necessary steps to preserve such trade secret, and has not granted to any individual, firm, partnership, corporation, association or other entity any interest or rights in any of the Purchased Software, including rights to use, development or enhancement, as licensee or otherwise. Schedule 2.07 also includes a complete list of persons who have had access to the source code comprising any portion of the Purchased Software or documentation which reveals such source code.

Section 2.08. Litigation. Except as otherwise set forth in Schedule 2.08 hereto, as of the date hereof there is no action, suit or proceeding pending or, to Seller's, White's and Reyburn's knowledge, threatened against Seller, White or Reyburn relating to the Purchased Software, and neither of them has received any notice of any pending, or to either's knowledge threatened, action or proceeding against Seller, White or Reyburn the outcome of which would affect materially and adversely their right or ability to convey and transfer the Purchased Assets free and clear of any liens or encumbrances.

Section 2.09. Annual Update Contracts. Schedule 2.09 is a complete and accurate list (in all material respects) of all annual update (upgrade) contracts for the Purchased Software which have not expired as of the Closing.

Section 2.10. Brokerage Commissions. Seller has not incurred any liability for finder's or brokerage, fees or commission in connection with this Agreement or the transactions hereby contemplated.

Section 2.11. Representation At Closing. All of the representations and warranties of Seller made herein shall be true at and as of the Closing as though such representations and warranties were made at and as of such time.

Section 2.12. Customer List. To the best knowledge of Seller, Schedule 1.02-4 is a complete list (in all material respects) of Seller's customers with respect to the Business and end users of the Purchased Software.

ARTICLE III
REPRESENTATIONS AND WARRANTIES OF PURCHASER

Purchaser represents and warrants to Seller, White and Reyburn that:

Section 3.01. Organization and Good Standing. Purchaser is a corporation duly

organized, validly existing and in good standing under the laws of The Commonwealth of Massachusetts, and has the corporate power and authority to enter into this Agreement and carry out the transactions hereby contemplated.

Section 3.02. Corporate Authorization. Purchaser has taken all corporate action required to be taken by it to authorize the execution and delivery of this Agreement and the other agreements to be executed and delivered by Purchaser hereunder (together with this Agreement, the "Purchaser's Documents") and the transactions hereby and thereby contemplated. Purchaser has the corporate power and authority to execute and deliver Purchaser's Documents, to consummate the transactions thereby contemplated and to take all other actions required to be taken by it pursuant to the provisions thereof; and this Agreement is, and the other Purchaser's documents on the Closing will be, valid, and binding upon and enforceable against Purchaser in accordance with their respective terms. Neither the execution and delivery of Purchaser's Documents nor the consummation of the transactions hereby and thereby contemplated will constitute any violation or breach of the Certificate of Incorporation or the by-laws of Purchaser. Purchaser has the lawful power to own its properties and to engage in the business it conducts, and it is duly qualified and in good standing as a foreign corporation in the jurisdictions wherein the nature of the business transacted by it or property owned by it makes such qualification necessary.

Section 3.03. Government Approvals. No authorization, approval, order, license, permit, franchise, or consent and no registration, declaration or filing by or with any domestic or foreign governmental authority is required in connection with the execution and delivery by Purchaser of Purchaser's Documents and the consummation by Purchaser of the transactions contemplated hereby and thereby. Each consent, approval or authorization of, or filing, registration or qualification with, any person required to be obtained by Purchaser, in connection with the execution and delivery of Purchaser's Documents or the undertaking or performance of any obligation hereunder or thereunder has been duly obtained or effected.

Section 3.04. Brokerage Commissions. Except as set forth on Schedule 3.04 Purchaser has not incurred any liability for finder's or brokerage fees or commission in connection with this Agreement or the transactions hereby contemplated.

Section 3.05. Representation At Closing. All of the representations and warranties of Purchaser made herein shall be true at and as of the Closing as though such representations and warranties were made at and as of such time.

Section 3.06. Litigation. Except as otherwise set forth in Schedule 3.06 hereto, there is

no action, suit or proceeding pending against Purchaser, and Purchaser has not received any notice of any pending or threatened action or proceeding, the outcome of which may affect materially and adversely the business, assets or financial condition of Purchaser, or its ability to undertake the obligations of Purchaser contemplated by this Agreement, in any court, before any arbitrator or arbitration tribunal or before or by any governmental authority, agency or other instrumentality, domestic or foreign. Purchaser is not in default under or with respect to any judgment, order or decree of any court, any arbitrator or arbitration tribunal or any governmental authority, agency or other instrumentality, domestic or foreign, against or affecting the business of Purchaser, or any of Purchaser's assets, and there is no outstanding judgment, order or decree of any court, any arbitrator or arbitration tribunal or any governmental authority, agency or other instrumentality against or adversely affecting Purchaser, or any of its assets.

Section 3.06. Financial Statements. Purchaser has delivered to Seller internally prepared financial statements through December 31, 1997. All of such financial statements have been prepared in accordance with generally accepted accounting practices consistently applied and said financial statements present fairly the financial position of Purchaser as of the date thereof and the results of operation of Purchaser for the periods involved.

ARTICLE IV
CONDITIONS TO PURCHASER'S OBLIGATIONS

All obligations of Purchaser under this Agreement are subject to the fulfillment, at the Closing, of each of the following conditions, any or all of which may be waived in whole or in part at or prior to the Closing by Purchaser:

Section 4.01. Representations and Warranties. The representation and warranties contained in Article II hereof shall be true at and as of the closing, and all of the other representations and warranties contained in said Article II shall be true at and as of the Closing as though such representations and warranties were made at and as of such time.

Section 4.02. Covenants. Seller shall have performed and complied with all agreements and conditions on its part required by this Agreement to be performed or complied with prior to or at the Closing.

Section 4.03. Governmental Consents. Purchaser and Seller shall have made all fillings and petitions required to be made by them prior to the Closing (and all applicable waiting periods shall have received all consents, approvals, authorizations and permits required to be obtained prior to the Closing from, governmental and regulatory authorities of the United States, the several States and foreign jurisdictions, in

connection with the execution, delivery and performance of this Agreement and the consummation of the transactions hereby contemplated.

Section 4.04. Legality. No change shall have occurred in any law, rule or regulation that would prohibit the performance of Purchaser's obligations under Article I hereof.

Section 4.05. Injunctions. No court, agency or other authority shall have issued any order, decree or judgment to set aside, restrain, enjoin or prevent the performance of Purchaser's obligations under Article I hereof nor shall there be pending any suit, action or proceeding requesting such relief or remedy.

Section 4.06. Consents. To the extent necessary, there shall have been obtained the consent, in form and substance reasonably satisfactory to counsel for Purchaser, (i) of each other party to the Included Contracts to the assignment of such Included contracts to Purchaser and/or to the consummation of the transactions contemplated hereby, and (ii) of all applicable governmental authorities, agencies or instrumentalities to the assignment of all those certificates, licenses, permits, authorizations and approvals.

Section 4.07. Non-competition Agreements with Key Personnel. Purchaser shall have entered into one or more employment,

consulting and non-competition agreement with David Reyburn in a form or forms satisfactory to Purchaser.

Section 4.08. Conveyances. Purchaser shall have received all conveyances, covenants, warranties, deeds, assignments, bills of sale, confirmations, powers of attorney, approvals, consents and any and all further instruments as may be reasonably necessary in order to complete any and all conveyances, transfers, assignments and deliveries provided for herein and to convey to Purchaser title to the assets, properties and software conveyed hereunder.

Section 4.09. Legal Matters Satisfactory. All actions, proceedings, instruments and documents required by or from Seller to carry out the transactions contemplated by this Agreement, or incidental thereto, and all other relevant legal matters, shall be reasonably satisfactory in all respects to counsel for Purchaser.

Section 4.10. Consent of Shareholders and Directors. Seller shall have obtained approval of this Agreement and the transaction contemplated hereby by its Board of Directors and its Shareholders.

Section 4.11. Confidentiality Agreements. Purchaser shall have received evidence in a form reasonably satisfactory to Purchaser that the persons or entities who have had

access to the source code of the Purchased Software have entered into appropriate understandings of confidentiality and restrictions on use.

ARTICLE V
CONDITIONS TO SELLERS' OBLIGATIONS

All obligations of Seller, White and Reyburn under this Agreement are subject to the fulfillment, at the Closing, of each of the following conditions, any or all of which may be waived in whole or in part at or prior to the Closing by Seller, White and Reyburn.

Section 5.01. Representations and Warranties. The representations and warranties contained in Article III hereof shall be true at and as of the Closing, and all of the other representations and warranties contained in said Article III shall be true at and as of the Closing as thought such representations and warranties were made at and as of such time.

Section 5.02. Purchaser's Board of Directors Approval. Purchaser shall have obtained approval of this Agreement and the transaction contemplated hereby by its Board of Directors.

Section 5.03. Covenants. Purchaser shall have performed and complied with all agreements and conditions on its part required by

this Agreement to be performed or complied with prior to or at the Closing.

Section 5.04. Governmental Consents. Purchaser, and Seller shall have made all filings required to be made by them prior to the Closing (and all applicable waiting periods shall have expired) with, and Seller shall have received all consents, approvals, authorizations and permits required to be obtained prior to the Closing form, all governmental and regulatory authorities of the United States, the several States and foreign jurisdictions, in connection with the execution, delivery and performance for this Agreement and the consummation of the transactions hereby contemplated.

Section 5.05. Legality. No change shall have occurred in any law, rule or regulation, that would prohibit the performance of Seller's obligations under Article I hereof.

Section 5.06. Injunctions. No court, agency or other authority shall have issued any order, decree or judgment to set aside, restrain, enjoin or prevent the performance of Seller's obligations under Article I hereof nor shall there be pending any suit, action or proceeding requesting such relief or remedy.

Section 5.07. Legal Matters Satisfactory. All actions, proceedings, instruments and documents required by or from Purchaser to

carry out this Agreement, or incidental thereto, and all other relevant legal matters, shall be reasonably satisfactory in all respects to counsel for Seller.

ARTICLE VI
NON-COMPETITION AND CONFIDENTIALITY

Section 6.01. Non-Competition; Use of Names; Confidentiality. Seller and White, jointly and severally, and Reyburn individually, covenant and agree that from and after the closing they shall not:

(a) At any time prior to the fifth anniverwsary of the Closing, in any state in the United States, or in any other country in the world, own, manage, operate, join or control, or participate in the ownership, management, operation or control of any business, firm or corporation which engages in the business of designing, manufacturing, selling or distributing products which compete with the Purchased Software; provided, however, that the provisions of this Section 6.01 (a) shall not apply to investments in securities of a corporation traded on a registered national securities exchange or on the Noational Over-The-Counter Market, which shall constitute less than five percent (5%) of the outstanding voting shares of such corporation.

(b) Directly or indirectly use or permit to be used in any manner the names FastSURF and FastSOLIDS (or any other trademark or trade

name currently used in the Business) or any name or names similar to or likely to be confused with such names (or any other trademark or trade name currently used with respect to the Purchased Software.

(c) At any time prior to the fifth anniversary of the Closing, directly or indirectly, solicit any employee of Purchaser to become an employee of Seller, White or Reyburn or any affiliate of any of them.

(d) At any time prior to the fifth anniversary of the Closing, use or disclose to any party any non public information with respect to the Business except as may be required by court or government order or applicable law or for Seller to obtain director or shareholder approval of the transactions contemplated hereby.

(e) At any time prior to the fifth anniversary of the Closing, engage in any conduct which is disparaging of Purchaser or it products or which interferes with Purchaser's business relationships or its possession, enjoyment and commercial exploitation of the Purchased Software.

Section 6.02. Breach. In the event of a breach or threatened breach of the provisions of Section 6.01, in addition to any other remedies Purchaser may have at law or in equity and notwithstanding the provisions of Section 10.11, Purchaser shall be entitled to seek an injunction or similar remedy so as to enable it specifically to enforce such provisions.

ARTICLE VII
POST-CLOSING COVENANTS

Section 7.01. Further Assurances. From and after the Closing, Seller, White and Reyburn shall, at any time and from time to time, make, execute and deliver, or cause to be made, executed and delivered, such assignments, deeds, bill of sale, drafts, checks, stock certificates, returns, filings and other instruments, consents and assurances and take or cause to be taken all such action as counsel for Purchaser may reasonably request for the effectual consummation, confirmation and particularization of this Agreement and the transactions hereby contemplated. The out-of-pocket costs and expense of any further assurances shall be borne by Purchaser.

ARTICLE VIII
TERMINATION AND ABANDOMENT

Section 8.01. Termination. This Agreement may be terminated at any time prior to the Closing:

(a) by mutual consent of Purchaser and Seller;

(b) by Purchaser, if there has been a material violation or breach by Seller of any agreement, representation or warranty contained in this Agreement, or if the satisfaction of any condition to the obligations of Purchaser hereunder

becomes impossible or has not occurred on or before April 30, 1998, and such violation, breach or condition has not been waived by Purchaser; or

(c) by Seller, White or Reyburn if (1) there has been a material violation or breach by Purchaser of any agreement, representation or warranty contained in this Agreement, or if the satisfaction of any condition to the obligations of Seller, White or Reyburn hereunder becomes impossible or has not occurred on or before April 30, 1998, and such violation, breach or condition has not been waived by Seller, White or Reyburn or (2) Seller's directors and shareholders do not approve the transactions contemplated b y this Agreement by April 30, 1998.

Section 8.02. Term. Unless otherwise terminated pursuant to Section 8.01, this Agreement shall extend for a term ending upon the earlier of the expiration of any obligation of Purchaser to pay royalties to Seller under Section 1.04, or the fifth anniversary of this Agreement.

ARTICLE IX
INDEMNIFICATION

Section 9.01. By Seller. Seller, agrees to indemnify and hold harmless Purchaser from and against, and to reimburse Purchaser on demand with

respect to, any and all loss, damage, liability, claims, costs and expense, (including, without limitation, reasonable attorneys' and accountants' fees) actually incurred by Purchaser by reason of or arising out of or in connection with (i) the material breach of any representation or warranty contained in Article II hereof or in any certificate or other document delivered to Purchaser pursuant to the provisions of the Agreement, (ii) the failure of Seller to perform any agreement required by this Agreement or any other agreement contemplated hereby to be performed by it, not excused by the failure of Purchaser to meet a condition required by Purchaser to Seller's performance, (iii) any failure to obtain any material consent required by Purchaser to be obtained by Seller pursuant to this Agreement or the transactions contemplated hereby if the Closing is consummated, (iv) any liability or obligation of Seller not expressly assumed by Purchaser pursuant to Article I hereof, (v) any liability or obligation to employees of Seller. Purchaser agrees to give prompt notice to Seller of the allegation by any third party of the existence of any liability, obligation, contract, other commitment or state of facts referred to in this Section 9.01 and Seller shall have the right to participate in the contest, defense, settlement or compromise of any such claim at their own cost and expense, including the cost and expense of attorneys' fees in connection with such contest, defense, settlement or compromise. Purchaser shall not settle or compromise any such claim without the prior written consent of Seller, which shall not be unreasonably withheld.

Section 9.02. By Purchaser. Purchaser agrees to indemnify and hold harmless Seller from and against, and to reimburse Seller with respect to, any and all loss, damage, liability, claims, costs and expense, including, reasonable attorneys' and accountants' fees, incurred by Seller by reason of or arising out of or in connection with (i) the breach of any representation or warranty contained in Article III hereof, or in any certificate or other document delivered by Purchaser to Seller under Agreement, (ii) the failure of Purchaser to perform any agreement required by this Agreement or any other agreement contemplated hereby to be performed by it, (iii) any action, suit, charge, complaint, proceeding or investigation to the extent arising out of or in connection with the business operations of Purchaser subsequent to the Closing or (iv) any liability or obligation expressly assumed by Purchaser pursuant to Article I hereof. Seller agrees to give prompt notice to Purchaser of the allegation by any third party of the existence of any state of facts referred to in this Section 9.02 and Purchaser shall have the right to participate in the contest, defense, settlement or compromise of any such claim at its own cost and expense, including the cost and expense of attorneys' fees in connection with such contest, defense, settlement or compromise. Seller shall not settle or compromise any such claim without the prior written consent of Purchaser, which shall not be unreasonably withheld.

ARTICLE X
MISCELLANEOUS

Section 10.01. Expenses. Each of the parties hereto shall pay its own expenses (including attorney's fees) in connection with this Agreement and the transactions hereby contemplated.

Section 10.02. Notices. All notices required or permitted hereunder shall be in writing and shall be given when personally delivered or sent by registered or certified mail, postage prepaid, or by telegram, cable, telex or facsimile. Such notices shall be addressed respectively:

As to Seller and White:

Robert White
FastSURF, Inc.
340 So. Washington Street
Sonora, CA 95370

As to Reyburn:

David Reyburn
Advancing Geometrics, Inc.
20544 County Road
Goshen, IN 46526

Copy to:

>

As to Purchaser:

Karen L. Bean
Baystate Technologies, Inc.
33 Boston Post Road West, Suite 420
Marlborough, MA 01752

Copy to:

George B. Sanders, Jr., Esq.
Bowditch & Dewey
311 Main Street
Worcester, MA 01608

Or to any other address which such party may have subsequently communicated to the other party in writing.

Section 10.03. Amendments, etc. All prior agreements, contracts, promises, representations and statements, if any, among the parties hereto, or their representatives, as to the subject matter hereof, are merged into this Agreement and this Agreement and the other agreements entered into in connection herewith shall constitute the entire agreement between them. This Agreement, supersedes all prior written and oral understandings of the parties, and no waiver or modification of the terms hereof shall be valid unless in writing signed by the party to be charged and only to the extent therein set forth.

Section 10.04. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of The Commonwealth of Massachusetts applicable to contracts made and wholly performed in such state by residents thereof without giving effect to the conflict of laws principles thereof.

Section 10.05. Assignment. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective sucessors and assigns, provided that this Agreement may not be assigned to any third party without the prior written consent of the other party; provided, however, that Purchaser may assign this Agreement in connection with the sale of substantially all of its business or assets, or a transaction of substantially the same effect.

Section 10.06. Publicity. Purchaser and Seller shall consult with one another before issuing any press release or public announcement about the transactions contemplated by this Agreement. Except as my be required by applicable law, no party shall issue any press release or other public announcement without the consent of the other party, which shall not be unreasonably withheld.

Section 10.07. Taxes. Any taxes in the nature of title transfer, recordation or registration taxes, documentary stamps or similar fees but not including and federal or state income, excise, employment, dales, use, revenue, capital gain or

similar taxes and related withholding taxes, payable on the sale or transfer of all or any portion of the assets, properties or business being transferred hereunder or the consummation of any other transaction contemplated hereby, shall be shared equally by Purchaser and Seller at or after the Closing.

Section 10.08. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which taken together shall constitute a single agreement.

Section 10.09. Captions. The captions and the table of contents appearing in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope and intent of this Agreement or any of the provisions hereof.

Section 10.10. Third Party. Other than the parties hereto, no person shall have any rights under or to enforce any provisions of this Agreement.

Section 10.11. Disputes; Resolution and Arbitration. This paragraph will govern any dispute between or among any of the parties hereto, arising from or related to the subject matter of this Agreement that is not resolved by agreement between their respective personnel responsible for day to day administration and performance of this Agreement.

Prior to the filing of any suit with respect to such a dispute (other than a suit seeking injunctive relief with respect to intellectual property rights), the party believing itself aggrieved (the "Invoking Party") will call for progressive management involvement in the dispute negotiation by notice to the other party. Such a notice will be without prejudice to the Invoking Party's right to any other remedy permitted by this Agreement.

The parties agree that they will use their best efforts to arrange personal meetings and/or telephone conferences as needed, at mutually convenient times and places, between their negotiators at the following successive management levels, each of which sill have a period of allotted time as specified below in which to attempt to resolve the dispute:

PURCHASER	SELLER and WHITE	Reyburn	TIME
First Level	CFO	White	Reyburn 10 days
Second Level	CEO	White	Reyburn 10 days

The allotted time for the first-level negotiators will begin on the effective date of the Invoking Party's notice. If a resolution is not achieved by the negotiators at any given management level at the end of their allotted time, then the allotted time for the negotiators at the next management level, if any, will begin immediately. If a resolution is not achieved by negotiators at the final management level within their allotted time, then either party

may within ten (10) business days request mediation to resolve the dispute.

The Mediation Rules of the American Arbitration Association shall be used unless the parties to the dispute agree otherwise. The mediation shall take place in the city located nearest to the party that did not initiate the mediation. The allotted period for the completion of the mediation shall be thirty (30) days. If a resolution is not achieved by mediation within the allotted time or if mediation is not requested with the permitted ten-day period; then either party may file an arbitration demand or other permitted action to resolve the dispute.

Section 10.12. Arbitration. In the event a dispute between the parties arising under this Agreement is not resolved using the procedures of Paragraph 10.11, the parties shall submit to binding arbitration before a single arbitrator in Boston, Massachusetts, under the Commercial Arbitration Rules of the American Arbitration Association, except that temporary restraining orders or preliminary injunctions, or their equivalent, may be obtained from any court of competent jurisdiction. The pre-hearing and hearing proceedings in the arbitration shall be generally governed by the Federal Rules of Civil Procedure and the judicial precedent interpreting those rules. The decision of the arbitrator shall be final and binding with respect to the dispute subject to the arbitration and shall be enforce able in any court of competent

jurisdiction. Each party shall bear its own expenses, attorney's fees and costs incurred in such arbitration.

Section 10.13. Mutual Release of Parties. In consideration of good and valuable consideration and of the promises and representation contained here, the receipt whereof is hereby acknowledged, each of the parties hereto hereby expressly releases each of the other parties hereto and forever discharges such other party and any and all affiliates, subsidiaries, directors, officers, employees and agents of such other party for all debts, demands, actions, causes of action, suits, accounts, covenants, contracts, agreements, damages, and any and all claims, demands and liabilities whatsoever of every name and nature, both in law and in equity, which against such other party and any and all affiliates, subsidiaries, directors, officers, employees and agents of such other party which the Releasing Party now has or ever had form the beginning of the world. This Release is not intended to otherwise affect the parties' future rights and responsibilities which they have with respect to each other under this Agreement.

IN WITNESS WHEREOF, each of the parties hereto has executed this Agreement the day and year first above written.

FastSURF, INC.	BAYSTATE TECHNOLOGIES INC.
By: /s/ Robert White	By: /s/ Karen L. Bean
Title President	Title COO
/s/ Robert White	/s/ David Reyburn
Robert White	David Reyburn

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SUPREME COURT, U.S.

No. 07-949

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT WHITE,

Petitioner,

v.

JOSEPH B. COLLINS,
CHAPTER 7 TRUSTEE FOR
CK LIQUIDATION CORPORATION
(F/K/A CADKEY CORPORATION),

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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Questions Presented

Contrary to the Petitioner's assertions otherwise, the only issues on appeal before the lower courts and, thus, the only questions presented for this Court's consideration are as follows:

1. Whether the Court of Appeals for the First Circuit ("First Circuit") properly concluded that the United States Bankruptcy Court for the District of Massachusetts (Western Division) (the "Bankruptcy Court") did not err as a matter of law in denying Petitioner's second Motion to Vacate the Sale Order for failure to meet the requirements of Fed. R. Civ. P. 60(b)(4)?

2. Whether the First Circuit properly concluded, based on the record of the case and the Bankruptcy Court's finding that Petitioner has repeatedly filed frivolous pleadings, causing interference with the estate's administration, that the Bankruptcy Court did not abuse its discretion in restraining and enjoining Petitioner from filing, *pro se*, any further papers, pleading or documents in the Chapter 7 case, except those which relate to: (1) any matter in which Petitioner is a named respondent or defendant; or (2) an appeal of any order of the Bankruptcy Court?

3. Whether the First Circuit properly concluded that the Bankruptcy Court did not err as a matter of law in denying Petitioner's claim for administrative expense priority under

Sections 503(b) and 507(a)(1) of the Bankruptcy Code?

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Introduction

Petitioner Robert White ("White" or "Petitioner") has presented no "compelling reasons" for his Petition for a Writ of Certiorari ("Petition") to be granted. See Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate, or even argue, that the First Circuit's June 29, 2007 Judgment is in conflict with a decision of this Court or another Court of Appeals or that the First Circuit decided an important federal question that has not been settled by this Court or conflicts with relevant decisions of this Court. See Sup. Ct. R. 10 (a)-(c). In fact, Petitioner has not even carried his significantly less strenuous burden of showing that the Bankruptcy Court (i) erred in denying his second Motion to Vacate the Sale Order for failure to meet the requirements of Fed. R. Civ. P. 60(b)(4), (ii) abused its discretion in restraining and enjoining him from filing, *pro se*, any further papers, pleadings or documents in the Chapter 7 case, except in limited circumstances, or (iii) erred in denying his claim for administrative expense priority under Sections 503(b) and 507(a)(1) of the Bankruptcy Code – which would, in any event, constitute insufficient grounds to grant the Petition. See id.

Instead, as has been his practice throughout these proceedings (and his numerous other appeals), Petitioner advances several frivolous arguments that are (i) without merit, (ii) irrelevant to the questions presented, (iii) have not been preserved or (iv) were contained in his prior certiorari petition to this Court, denied on February 21, 2006. None of Petitioner's arguments warrant this Court's

consideration (or reconsideration as the case may be). Petitioner has failed completely to carry his burden of demonstrating that there are compelling reasons for this Court to grant the Petition. Accordingly, like his prior related certiorari petition - which sought to overturn the same Bankruptcy Court order - the Petition should be denied.

Statement of the Case

Supreme Court Rule 24.1(g) requires that the statement of the case "set[] out the facts material to the consideration of the questions presented." The Petitioner's "Statement of the Case" is replete with misstatements, mischaracterizations and irrelevant background, and does not support the consideration of the questions presented. The Respondent submits the following statement of the case, focusing on the relevant facts in the record and, where appropriate, identifying the misstatements made by the Petitioner, as required by Supreme Court Rule 15.2.

Background

Petitioner is an unsecured creditor of the Debtor, and was a potential bidder for its assets, who has, over the past four years, employed a strategy of filing numerous duplicative and frivolous pleadings and appeals in an attempt to advance his economic interests in the Debtor's bankruptcy case. Originally a member of the Official Committee of Unsecured Creditors (the "Committee") appointed upon the filing of the Debtor's Chapter 11 petition for relief, Petitioner sought to block the sale of the Debtor's assets, being unable to procure financing for his own

purchase. His objection overruled, Petitioner – as he was entitled to – filed an appeal of the order approving the sale (the "Sale Order"). But during the course of his Sale Order appeal, which concluded following this Court's denial of his certiorari petition, Petitioner also engaged in filing an endless stream of additional pleadings, including a motion to vacate the Sale Order while his appeal therefrom was pending, a motion for reconsideration of the denial of the motion to vacate the sale order, a motion seeking disgorgement of the fees of counsel for the Debtor and the Committee (which had already been approved by the Bankruptcy Court after notice to Petitioner), and appeals from all of the orders denying the above motions.

Petitioner's latest filings (the subject of his Petition) are no different than the numerous pleadings and appeals that he has filed over the past few years. Once again, Petitioner seeks to abuse the court process by (i) attempting to relitigate the Sale Order for the third time and (ii) seeking a claim status in the Chapter 7 case to which he is clearly not entitled. The Bankruptcy Court recognized the baseless nature of Petitioner's latest pleadings, denying both his second Motion to Vacate Sale Order and his Application for Payment of Priority Administrative Claim. In an effort to protect the integrity of the bankruptcy process going forward, the Bankruptcy Court imposed restrictions on Petitioner to reduce his opportunity for filing frivolous papers in the future. The United States District Court for the District of Massachusetts (the "District Court") and First Circuit affirmed both

Bankruptcy Court orders and upheld the filing restriction.

Sale Order; Appeals

The Debtor commenced a Chapter 11 case by filing a voluntary petition for relief on August 22, 2003. On August 29, 2003, the Debtor moved the Bankruptcy Court for an order approving the sale of substantially all of the Debtor's assets (the "Sale Motion"). [Bankr. Docket No. 25.][1] On or about October 9, 2003, Petitioner, who was represented by counsel throughout the Bankruptcy Court proceedings on the Sale Motion, filed an objection thereto (the "White Objection") on the basis that unsettled litigation against the Debtor's estate (the "Bowers Litigation") would adversely affect the sale price, and that more time was needed after the Bankruptcy Court's determination of the issues in the Bowers Litigation for potential purchasers to assess the impact that the claim of Harold Bowers ("Bowers") would have on the sale process. [Bankr. Docket No. 102.]

The Bankruptcy Court heard argument and testimony on the Sale Motion at hearings held on October 20, 2003, October 27, 2003, October 28, 2003, October 30, 2003 and November 6, 2003 (collectively, the "Sale Hearing"). In the meantime,

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[1] Petitioner filed an appendix with the Petition. Accordingly, record cites in this brief indicate whether the item is contained in the appendix "[Pet. App. p. __]" or the Bankruptcy Court docket [Bankr. Docket No. __]", which items are part of the record below.

Bowers settled the Bowers Litigation with respect to the Debtor's estate. On November 6, 2003, the Bankruptcy Court entered the Sale Order overruling the White Objection, and approving the sale of Debtor's assets to Kubotek Corporation ("Kubotek") in a transaction involving total consideration of approximately $3,600,000.[2] [Bankr. Docket No. 121.] The Bankruptcy Court found no evidence that the Bowers Litigation negatively impacted either the sale process or the ultimate sale price. The Bankruptcy Court also found no evidence that the outcome would have been different had there been an extension of the sale date.[3] After considering the

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[2] As is discussed more fully below, $750,000 of the total consideration was paid directly to Bowers in connection with his withdrawal of the Bowers Objection and a release of claims asserted in the Bowers Litigation. Significantly, Bowers' claim in the bankruptcy constituted approximately 90% of the total of the unsecured claims listed on the Debtor's Schedules of Assets and Liabilities [Bankr. Docket No. 41]; thus, the settlement payment made directly to him had a substantial, beneficial impact on the treatment of creditors generally in the case. In his Petition, p. 36, White fails to acknowledge this significant consideration when he claims that the assets were sold for a total of $2.85 million.

[3] The Bankruptcy Court also found that, despite an inconsistency in the testimony of Kubotek's principal, Mr. Kakishita, that precluded a good faith finding under Section 363(m), there was no evidence that Kubotek conducted itself improperly before the sale. [Bankr. Docket No. 244, p. 12.] The Bankruptcy Court recognized that notwithstanding Mr. Kakishita's testimony, the Debtor's sale to Kubotek was in the best interests of the Debtor's creditors. [Id.] The Bankruptcy Court stated that it could have chosen to disqualify Kubotek from the sale altogether, but did not feel the evidence warranted such drastic action. [Id.]

White Objection and allowing Petitioner to present his objection to the court at the Sale Hearing, the Bankruptcy Court held that Petitioner's objection suffered "from a complete failure of evidence and proof."[4] [Bankr. Docket No. 243, p. 43:18-20.] The sale closed on December 2, 2003.

On November 14, 2003, Petitioner filed a notice of appeal regarding the Sale Order in the District Court. [Bankr. Docket Nos. 126 and 127.] On November 8, 2004, the District Court affirmed the Sale Order. Petitioner subsequently appealed to the First Circuit (the appeal was dismissed) and then, on December 12, 2005, Petitioner filed a petition for a writ of certiorari to this Court, which was denied on February 21, 2006. On April 17, 2007, the Court denied his petition for a rehearing.

Case Converted

On March 4, 2004, the Debtor's case was converted to a case under Chapter 7 of the Bankruptcy Code [Bankr. Docket No. 239]. On March 5, 2004, John A. Burdick was appointed as trustee in this case. Petitioner did not object to the conversion of the case. Joseph B. Collins was appointed as successor trustee in this case on March 14, 2006 (together with Burdick, as predecessor trustee, the "Trustee").

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[4] White was afforded the opportunity to present evidence in support of his position respecting the Sale Motion at the Sale Hearing, but failed to do so.

Petitioner's First Motion to Vacate; Appeals

On August 13, 2004, while his appeal of the Sale Order was still pending, Petitioner filed his first Motion to Vacate the Sale Order on the basis that estate counsel committed fraud on the Bankruptcy Court in seeking approval of the Sale Motion (the "First Motion to Vacate"). [Bankr. Docket No. 313.] The Bankruptcy Court denied the First Motion to Vacate on September 8, 2004 [Bankr. Docket No. 330] and, subsequently, Petitioner's motion for reconsideration. [Bankr. Docket No. 334.] Petitioner then filed an appeal in the District Court attacking the Bankruptcy Court's decision on his First Motion to Vacate. [Bankr. Docket No. 337.] On September 12, 2005, the District Court affirmed the Bankruptcy Court's order denying the First Motion to Vacate and, subsequently, denied Petitioner's motion for reconsideration. Petitioner unsuccessfully sought to appeal the District Court's order directly to this Court. Petitioner's time period to appeal the District Court's order has since expired.

Motion to Disgorge; Appeals

On October 12, 2004, Petitioner filed a Motion to Disgorge (the "Motion to Disgorge") seeking an order compelling the Debtor's Chapter 11 counsel, Ropes & Gray LLP, and counsel to the Official Committee of Unsecured Creditors, Sherin and Lodgen LLP ("S&L") (together with Ropes & Gray, "Estate Counsel"), to return their previously approved fees and expenses to the Debtor's estate. [Bankr. Docket No. 348.] As found by the

Bankruptcy Court, the Motion to Disgorge was based largely on a "twisting" of statements taken from the Bankruptcy Court's order denying Petitioner's First Motion to Vacate. The Bankruptcy Court rejected Petitioner's arguments, and denied the Motion to Disgorge on October 19, 2004. [Bankr. Docket No. 353.] Petitioner subsequently filed an appeal in the District Court attacking the Bankruptcy Court's decisions on the Motion to Disgorge. [Bankr. Docket No. 357.] On December 10, 2004, after the Trustee had already undertaken to prepare and designate the record appendix, the District Court dismissed Petitioner's notice of appeal for failure to pay the filing fee.

In its order denying the Motion to Disgorge, the Bankruptcy Court also ordered that Petitioner appear and show cause "why he should not be sanctioned pursuant to Fed. R. Bank. P. 9011(c)(1)(b), on account of the filing of this frivolous motion." [Bankr. Docket No. 353.] On November 16, 2004, the Bankruptcy Court held the show cause hearing and made the following ruling:

> I find that the allegations made in the motion to disgorge, particularly in the context of previous pleadings filed by Mr. White, are not warranted by – were not warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; that they were presented for an improper purpose, and that is to harass estate functionaries....

[Bankr. Docket No. 403, p. 8:6-12.] Accordingly, the Bankruptcy Court sanctioned Petitioner $2,500.00 to be paid to the Trustee within 60 days (the "Sanction Order"). [Id. at p.8:13-16, 9:6-8.]

On November 26, 2004, Petitioner appealed the Sanction Order to the United States Bankruptcy Appellate Panel for the First Circuit (the "BAP"). [Bankr. Docket Nos. 393 and 395.] Petitioner did not, however, seek a stay of the Sanction Order pending the outcome of the BAP appeal. Nevertheless, and despite the Trustee's demand for payment, Petitioner refused to pay the sanction amount. On March 11, 2005, the BAP entered an order affirming the Sanction Order (the "BAP Order"). On April 8, 2005, Petitioner appealed the BAP Order to the First Circuit.

In the time between the entry of the BAP Order and the filing of the appeal, on March 16, 2005, the Trustee – having received no response to his payment demand – filed the Chapter 7 Trustee's Motion for Contempt Against Robert White (the "Contempt Motion"), for Petitioner's failure to abide by the Sanction Order. [Bankr. Docket No. 498.]

On May 23, 2005, the Bankruptcy Court held a hearing on Petitioner's motion for a stay of the Sanction Order and an evidentiary hearing on the related Contempt Motion. At the hearing, the Bankruptcy Court concluded that Petitioner had failed to meet the standard for the issuance of a stay under Fed. R. Bankr. P. 8005 and that he was in

contempt of the Sanction Order. Specifically, the Bankruptcy Court, after conducting an evidentiary hearing at which Petitioner disclosed his ownership of two automobiles with a value of $3,500 each [Bankr. Docket No. 727, p. 12.], found that Petitioner "had, at all times, the ability to comply with [the Sanction Order] . . . ." [Bankr. Docket No. 550.] As a result of Petitioner's contempt, the Bankruptcy Court sanctioned Petitioner an additional $1,000.00, for a total amount owed of $3,500.00, and ordered Petitioner to pay the entire sanction by June 17, 2005 (the "Contempt Order"). [Id.]

On June 28, 2005, Petitioner appeared at the scheduled hearing not having paid the amount ordered by the Bankruptcy Court, claiming that he was unable to satisfy the sanction. [Bankr. Docket No. 727, pp. 12-13.] The Bankruptcy Court concluded that there was "no basis to believe that [White] had made any effort to [sell the vehicles]." [Id.] Accordingly, Petitioner was incarcerated by the United States Marshall at the Wyatt Detention Center in Rhode Island. [Bankr. Docket No. 604.] On July 12, 2005, Petitioner was brought before the Bankruptcy Court for a continued contempt hearing. The sanction had still not been paid, and the Bankruptcy Court was unconvinced that Petitioner had made any attempt whatsoever to liquidate the vehicles. Petitioner was sent back to the Wyatt Detention Center, where he stayed until August 9, 2005. On August 9, 2005, the Bankruptcy Court conducted a further contempt hearing. Payment of the sanction was still not forthcoming. In an attempt to break the stalemate, the Bankruptcy Court offered Petitioner an alternative. If Petitioner

would agree to convey the vehicles to the Trustee so that the Trustee could liquidate them, Petitioner would be released from incarceration. Petitioner accepted the alternative, was released from incarceration, and the Court continued the contempt hearing until January 31, 2006 to allow the Trustee to sell the vehicles. [Bankr. Docket Nos. 618 and 619.]

On January 10, 2006, the Trustee filed an Application to Employ Auctioneer (the "Auctioneer Application"). [Bankr. Docket No. 692.] By the Auctioneer Application, the Trustee sought to employ an auctioneer to dispose of Petitioner's vehicles. [Id.] Petitioner objected to the Auctioneer Application. [Bankr. Docket No. 694.] After a hearing on the Auctioneer Application, on January 31, 2006, the Bankruptcy Court denied the Auctioneer Application and ordered that Petitioner be "purged of any contempt of this Court's previous orders that he pay to the bankruptcy estate sanctions in the sum of $3,500 . . . ." (the "Purge Order"). [Bankr. Docket No. 708.] No other provision of the Purge Order had any effect, direct or indirect, on Petitioner.

In yet another example of Petitioner's abusive litigation practice in this case, on February 13, 2006, Petitioner appealed the Purge Order to the District Court, notwithstanding the fact that it is favorable to his interests. [Bankr. Docket No. 710.] The appeal was ultimately dismissed for failure to pay the filing fee, but not until after Petitioner appealed a decision denying his Motion to Proceed In Forma

Pauperis and after he filed a Petition for a Writ of Mandamus with the District Court.

On November 7, 2006, the First Circuit issued a Briefing Notice for the appeal of the Sanction Order. Because the sanction had already been purged, the Trustee filed a motion to dismiss the appeal on the grounds that it was moot. On June 27, 2007, the First Circuit granted the motion. Petitioner's time period to appeal the First Circuit's decision has since expired.

Second Motion to Vacate; Appeals

With this Court's denial of his first writ of certiorari, Petitioner's appellate avenues with respect to the Sale Order were closed. Nevertheless, on March 14, 2006, Petitioner filed his second Motion to Vacate Sale Order (the "Second Motion to Vacate"), arguing that the Sale Order was void under Fed. R. Civ. P. 60(b)(4) because of the Bankruptcy Court's violations of his due process rights. [Bankr. Docket No. 724.] The Bankruptcy Court denied the Second Motion to Vacate on May 9, 2006. [Pet. App. pp. 9-16.]

In the Trustee's opposition to the Second Motion to Vacate, the Trustee renewed his request that the Bankruptcy Court consider the entry of an injunction prohibiting Petitioner from filing any

further pleadings concerning the Chapter 7 case.[5] [Bankr. Docket No. 750, p. 8.] Thus, contrary to his assertions in the Petition, pp. 41-42, Petitioner was on notice of the Trustee's request, and had an opportunity to object to that request at the hearing on the Second Motion to Vacate. [Bankr. Docket No. 782, pp. 1-18.] In response to the Trustee's request, the Bankruptcy Court crafted a restriction that bars Petitioner from filing, *pro se*, any papers in the Chapter 7 case, except those which relate to: (1) any matter in which Petitioner is a named respondent or defendant; or (2) an appeal of any order of the Bankruptcy Court. [Pet. App. pp. 12-16.] Because of the difficulty the Bankruptcy Court experienced in enforcing its prior orders designed to reduce Petitioner's frivolous filings, the Bankruptcy Court provided that in the event Petitioner violates the terms of the restrictions, the filing would be struck, no party would be required to respond, and an automatic sanction of $1,000 would be imposed, payable to the Trustee on behalf of the estate. [Id.] On May 18, 2006, Petitioner filed an appeal of the order to the District Court. [Bankr. Docket No. 791.] On August 28, 2006, the District Court affirmed the order. [Pet. App. pp. 5-7.] On June 27, 2007, the First Circuit affirmed the Bankruptcy Court order, concluding that Petitioner's claim of a due process violation was "without foundation" and that the filing restriction was "properly crafted to prevent further inappropriate filings." [Pet. App. pp. 2-3.]

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[5] In light of the mounting expense to creditors resulting from White's repetitive and frivolous motion practice, the Trustee had originally asked for this relief in the Chapter 7 Trustee's Response to this Court's Order to Show Cause dated November 15, 2004. [Bankr. Docket No. 384.]

Petitioner's Application for Payment of Priority Administrative Claim; Appeals

Prior to the Petition Date, on April 1, 1998, the Debtor's predecessor-in-interest, Baystate Technologies, Inc. ("Baystate"), entered into an acquisition agreement with FastSURF, Inc., Petitioner, and David Reyburn ("Reyburn"), to purchase certain computer software (the "Acquisition Agreement"). [Bankr. Docket No. 774, p. 2.] Pursuant to the Acquisition Agreement, Baystate agreed to pay Petitioner and Reyburn royalties on subsequent sales of software products incorporating the purchased software, such royalties to be divided equally between Petitioner and Reyburn. [Id.]

When Kubotek purchased substantially all of the Debtor's assets on December 2, 2003, it declined to take assignment of the Acquisition Agreement or to assume the obligations of the Debtor to Petitioner and Reyburn thereunder. On April 4, 2006, more than two years after the sale closing, Petitioner filed the Application for Payment of Priority Administrative Claim (the "Application for Payment"). [Bankr. Docket No. 764.] By the Application for Payment, Petitioner (i) correctly acknowledged that the Acquisition Agreement was not an executory contract, and (ii) erroneously claimed that he is entitled to an administrative claim for royalties arising under the Acquisition Agreement from July 1, 2003 to the sale closing date

– December 3, 2003 (the "Royalty Claim").[6] [Id.] On May 9, 2006, the Bankruptcy Court denied the Application for Payment, finding and ruling that Petitioner "failed to establish that his claim, if any, for royalties satisfies the conditions necessary to establish priority under [Sections] 503(b) and 507(a)(1) [of the Bankruptcy Code]." [Pet. App. pp. 18-20.][7] On May 18, 2006, Petitioner filed an appeal of the order to the District Court. [Bankr. Docket No. 791.] On August 28, 2006, the District Court affirmed the order. [Pet. App. pp. 5-7.] On June 27, 2007, the First Circuit affirmed the order.

Reasons Why The Petition Should Be Denied

This Court should deny the Petition because the Petitioner has failed to present any compelling reasons for granting his Petition. In any event, the Petitioner's arguments are entirely without merit, were properly decided by the First Circuit, and are not worthy of this Court's review.

I. The First Circuit Judgment Does Not Warrant this Court's Review

Petitioner has presented no "compelling reasons" for his Petition to be granted. See Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate,

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[6] This period includes the prepetition period of July 1, 2003 to the Petition Date.

[7] Petitioner's Appendix provides an incomplete copy of the Bankruptcy Court's Order. The quoted language above is correct, but the order contained in the Petitioner's Appendix is missing much of the cited language.

or even argue, that the First Circuit's judgment is in conflict with a decision of this Court or another Court of Appeals or that the First Circuit decided an important federal question that has not been settled by this Court or conflicts with relevant decisions of this Court. See Sup. Ct. R. 10 (a)-(c). For this reason alone, the Petition does not warrant this Court's review, and should be denied.

II. Petitioner's Arguments are Without Merit and Do Not Warrant this Court's Review

In any event, the Petitioner's arguments are without merit and have been properly considered and rejected by the First Circuit, District Court, and Bankruptcy Court. The Second Motion to Vacate and Application for Payment are merely a continuation of Petitioner's attack on the Debtor's estate and represent nothing more than an attempt to present new arguments – or slightly modified arguments – challenging the merits of the Sale Order, at the continuing expense of the Debtor's estate. Petitioner appears intent on following this course until he finds some way to derive a payment, from either the Trustee or Kubotek, to which he simply is not entitled under the Bankruptcy Code.

A. The Bankruptcy Court's Order Denying the Second Motion to Vacate and Enjoining Petitioner from Filing Further Pro Se Pleadings in the Chapter 7 Case is Entirely Appropriate

1. The Second Motion to Vacate Fails to Meet the Strict Requirements for Relief set forth in Fed. R. Civ. P. 60(b)(4)

By rehashing old arguments and fabricating due process violations, Petitioner, through the Second Motion to Vacate, is attempting to relitigate the Sale Order for a third time, when he has no right to do so. The First Circuit, District Court and Bankruptcy Court properly concluded that the Second Motion to Vacate fails to meet the strict requirements for relief set forth in Fed. R. Civ. P. 60(b)(4) (incorporated in Fed. R. Bankr. P. 9024). More specifically, (1) the Second Motion to Vacate was not timely made, and (2) the Sale Order is not void, as the Bankruptcy Court had jurisdiction to enter the Sale Order and in no way violated the due process rights of any party. The Second Motion to Vacate is completely unfounded, and the First Circuit was correct in affirming the Bankruptcy Court's denial.

2. The Second Motion to Vacate Was Not made Within a Reasonable Time

Some two and one-half years after the entry of the Sale Order, Petitioner is claiming, for the first time, that it is "void" within the meaning of Fed. R. Civ. P. 60(b)(4), because it violated his due process rights. [Bankr. Docket No. 724.] Fed. R. Civ. P. 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void. . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b).

Pursuant to Fed. R. Civ. P. 60(b), a motion seeking relief under subsection (4) must be made within a "reasonable time." Fed. R. Civ. P. 60(b). "What is 'reasonable' depends upon the circumstances of the particular case. The circumstances to be considered include the length of the delay, the justification for it, and the prejudice (if any) associated with the granting of relief." Farm Credit Bank v. Ferrera-Goitia, 316 F.3d 62, 66 (1st Cir. 2003).[8]

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[8] While other First Circuit cases have held that motions brought under Fed. R. Civ. P. 60(b)(4) may be made at any time, these cases focus on the lack of personal jurisdiction. See Sea-Land Service, Inc. v. Ceramica Europa Hato Rey, Inc., 160 F.3d 849, 852 (1st Cir. 1998); Precision Etchings & Findings, Inc. v. LGP Gem, Ltd., 953 F.2d 21, 23 (1st Cir. 1992) (same). But see United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990) (finding 60(b)(4) motion was not timely filed, but still considered whether the judgment was indeed void – it was not – even though there was no challenge to jurisdiction or alleged due process violation).

At the time the Second Motion to Vacate was filed, the Sale Order had been entered over two and one half years prior and had been the subject of numerous Petitioner appeals. There is simply no justification for this delay. The delay in bringing the Second Motion to Vacate "did not stem from ignorance of what had transpired," id. at 67, since Petitioner has been actively involved in the case from the outset, and well aware of applicable deadlines for objections and other pleadings. The Second Motion to Vacate is exactly what it appears to be – another attempt to prolong the Sale Order litigation and extract payments form the Trustee or Kubotek that Petitioner is not entitled to. Indeed, Petitioner gives no meaningful reason justifying the delay in filing his motion – only that he waited to see whether this Court would grant his first certiorari petition concerning his first appeal of the Sale Order. As soon as he learned his petition would not be granted, he filed yet another motion, with many of the same arguments, to attack the Sale Order.

Moreover, substantial prejudice would result from a reversal of the Sale Order on appeal. Such a reversal would likely have a disastrous effect on Kubotek's business and countless third parties, including post-acquisition creditors, customers and employees. Kubotek has operated the Debtor's former business since December 2003, paying employee wages and benefits, servicing customers and otherwise performing the obligations formerly performed by the Debtor. As the Bankruptcy Court noted,

> Over two and one-half years have passed since the issuance of the challenged order. White never obtained a stay pending appeal. Undoubtedly, the assets have now become well integrated into Kubotek's business.

[Pet. App. p. 11.] For these reasons, the Second Motion to Vacate can hardly be viewed as having been filed within a reasonable time.

3. The Sale Order is not Void, Because Petitioner's Due Process Rights Were Not Violated

In addition to the Motion's being untimely, Petitioner's argument that the Sale Order is void is wholly without merit. As the First Circuit has explained, "[a] judgment is void, and therefore subject to relief under Rule 60(b)(4), *only* if the court lacked jurisdiction *or* in circumstances in which the court's action amounts to a plain usurpation of power constituting a violation of due process." United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990). A judgment is not void simply because it is or may have been erroneous; it is void only if, from its inception, it was a legal nullity. Id. at 661; Lubben v. Selective Serv. Sys. Local Board No., 453 F.2d 645, 649 (1st Cir. 1972). "In the interests of finality, the concept of void judgments is narrowly construed." Id. at 661 (quoting United States v. Berenguer, 821 F.2d 19, 22 (1st Cir. 1987)). Given these strict requirements for relief, it is apparent that the Bankruptcy Court,

District Court, and First Circuit properly denied Petitioner's latest attack on the Sale Order.

In this case, Petitioner does not contest that the Bankruptcy Court had jurisdiction to enter the Sale Order. Instead, he makes an argument that the Sale Order deprived him of his right to due process. But that argument is unavailing. Section 363(b)(1) of the Bankruptcy Code provides that the trustee may use, sell or lease estate property only "after notice and a hearing." 11 U.S.C. § 363(b)(1). As this Court has noted, due process requires "notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citations omitted).

Petitioner has not been denied due process. From the first days of the case, Petitioner was informed of the Sale Motion. He presented his objections thereto with various filings and appearances at the sale hearings, at which able counsel represented him. Given Petitioner's participation in the sale process and subsequent appeals, and his role as a member of the Committee, his due process claim is simply frivolous. There has been no denial of due process in this case. And, there is simply nothing about the manner in which the Sale Hearings were conducted that "offends principals [sic] of equity and justice," as Petitioner contends. Petition at p. 38.

Thus, at bottom, the Second Motion to Vacate represents nothing more than an attempt to present new arguments – or slightly modified arguments – challenging the merits of the Sale Order, at the continuing expense of the Debtor's estate. The Motion seeks to present these arguments again by misusing Fed. R. Civ. P. 60(b)(4), and mischaracterizing the Sale Order as void, when Petitioner's due process rights were, in fact, scrupulously protected. Petitioner has been afforded a full and fair opportunity to present his objections to and appeals of the Sale Order – all of which have been considered and rejected by the Bankruptcy Court, this District Court, the Bankruptcy Appellate Panel of the First Circuit, and the First Circuit. Indeed, Petitioner made a similar due process argument in his prior petition filed with this Court – an argument that the Court apparently gave little or no weight when it denied that petition.

The law is clear: a motion under Fed. R. Civ. P. 60(b) cannot be used as a vehicle to relitigate matters previously decided by the courts. See Geo P. Reintjes Co., Inc. v. Riley Stoker Corp., 71 F.3d 44, 49 (1st Cir. 1995) (citing 7 J. Moore, Moore's Federal Practice ¶ 60.37 (1995)). In affirming the Bankruptcy Court order, the District Court properly concluded:

> [It was not] improper for the Bankruptcy Court to deny [White's] second Motion to Vacate Sale Order, which was nothing more than an attempt to relitigate – for the third time the propriety of the Sale Order. The

> record reveals no merit in [White's] claim that the entry of the Sale Order violated due process. Moreover, White's motion – filed over two and one-half years after entry of the Sale Order – was untimely. See Fed. R. Civ. P. 60(b) (requiring motions pursuant to Fed. R. Civ. P. 60(b)(4) to "be made within a reasonable time").

[Pet. App. p. 6.] The First Circuit agreed, ruling that:

> The record indicates that White was given prior notice of the sale of debtor's assets and the opportunity to challenge that sale. Hence any claim that the sale violated his rights to due process is without foundation.

[Pet. App. p. 3.]

4. Petitioner's Substantive Arguments in Support of the Second Motion to Vacate Need Not Be Considered by this Court on Appeal, and are Without Merit in Any Event

Under First Circuit precedent, appellate courts only look to the propriety of the denial of the motion for relief from judgment, and will not consider the merits of the underlying judgment. See Hoult v. Hoult, 57 F.3d 1, 3 (1st Cir. 1995). Accordingly, it would have been entirely appropriate

for the First Circuit to deny the Second Motion to Vacate by concluding that Petitioner has failed to meet the Fed. R. Civ. P. 60(b) standard alone, without considering Petitioner's substantive arguments.[9] The majority of the arguments set forth in Petitioner's First Circuit brief (and repeated in the Petition) address the merits of the Sale Order, and are not relevant to this appeal. Moreover, Petitioner's failure to raise many, if not all, of the arguments in his objection to the Sale Order and his First Motion to Vacate precludes their consideration here.[10]

In any event, Petitioner's substantive arguments are meritless. A party's right to royalties based on product sales does not give the party an interest in the property sold entitled to protection under Section 363(f) of the Bankruptcy Code. And even if it did, Petitioner received notice of the Sale Motion, and failed to raise this argument in the White Objection, or seek adequate protection of his alleged interest; thus, he is precluded from doing so now. See Precision Industries, Inc. v. Qualitech

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[9] It is unclear whether the First Circuit considered White's arguments. The judgment only states that the First Circuit "carefully reviewed the record in this case, including the briefs of the parties." [Pet. App. p. 2.]

[10] Most, if not all, of those substantive arguments have already been rejected by the District Court in its denial of White's appeal of the Sale Order and the First Motion to Vacate. They were also rejected by the First Circuit in connection with White's appeal of the Sale Order, and by this Court in connection with his first petition for certiorari.

Steel SBQ, LLC, 327 F.3d 537, 548 (7th Cir. 2003).[11] Petitioner even failed to raise the argument in his appeal of the Sale Order, and in the First Motion to Vacate. Had he timely raised the argument, he certainly would have been told by the Bankruptcy Court that, to the extent he held a cognizable interest in the Debtor's assets (which the Trustee does not concede), those assets could nonetheless be sold pursuant to Section 363(f)(1) of the Bankruptcy Code,[12] and that Petitioner's "interest" in the assets – consisting of an unsecured claim, no different than the claims of all of the Debtor's other unsecured creditors – would be adequately protected by preserving for him the right to file a claim and be

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[11] In this appeal, White now complains, for the first time, that he was misled by a schedule of "Assigned Contracts" attached to the Asset Purchase Agreement filed by Kubotek with the Bankruptcy Court on or about October 16, 2003, which provided that the Acquisition Agreement – which he now admits was not an executory contract – would be assumed by the Debtor and assigned to Kubotek if Kubotek were the successful bidder at auction. White points out that, later in the case, prior to the Sale Hearing, the Agreement was removed from the list of "Assigned Contracts," and later rejected by the Debtor. White fails to explain how these facts are relevant or caused him any prejudice, particularly in light of his own position that the Agreement could neither be assumed nor rejected under the Bankruptcy Code. Nor does he explain why he failed to raise this issue in connection with his appeal of the Sale Order, or in his First Motion to Vacate.

[12] Section 363(f)(1) permits assets to be sold free and clear of liens and interests if permitted by applicable nonbankruptcy law. Certainly, that is the case here – creditors holding mere unsecured claims cannot, even if those claims are construed as "interests" in the Debtor's business assets, block a sale of those assets under state law.

paid his share of the sale proceeds, pro-rata with all other unsecured creditors of the Debtor's estate.

Lastly, Petitioner's argument concerning the "absolute priority rule" is misplaced. As the Bankruptcy Court correctly noted,

> The "absolute priority rule" is a colloquialism describing the right of a debtor to have a Chapter 11 plan confirmed over the objection of a dissenting class of unsecured creditors by meeting a condition described in 11 U.S.C. § 1129(b)(2)(B)(ii). The absolute priority rule has no application here, as the Debtor's assets were sold under § 363 of the Bankruptcy Code, and not pursuant to a Chapter 11 plan.

[Pet. App. p. 12.] In sum, none of Petitioner's substantive arguments warrants further consideration by this Court. Accordingly, and, more importantly, because the Second Motion to Vacate fails utterly to meet the requirements for relief under Fed. R. Civ. P. 60(b)(4), the First Circuit judgment upholding the Bankruptcy Court's order denying the Second Motion to Vacate was appropriate.

B. Based on the Record of this Case, the Bankruptcy Court Did Not Abuse its Discretion in Restraining and Enjoining Petitioner from filing, Pro Se, Any Further Documents, Except in a Limited Set of Circumstances

The Bankruptcy Court properly determined that "a federal court may, in appropriate circumstances and with a well-tailored order, prospectively bar an abusive *pro se* litigant from filing papers." [Pet. App. p. 14.] It is well established that "[f]ederal courts ... possess discretionary powers to regulate the conduct of abusive litigants." Cok v. Family Court of Rhode Island, 985 F.2d 32, 34 (1st Cir. 1993)(per curiam). Thus, "in extreme circumstances involving groundless encroachment upon the limited time and resources of the court and other parties, an injunction barring a party from filing and processing frivolous and vexatious lawsuits may be appropriate." Castro v. United States, 775 F.2d 399, 408 (1st Cir. 1985)(per curiam), rev'd on other grounds, Stevens v. Dept. of Treasury, 500 U.S. 1 (1991). Given Petitioner's continued abusive motion practice, the Bankruptcy Court correctly decided that such relief would be entirely appropriate in this case.

In structuring the injunction, the Bankruptcy Court was guided by the First Circuit's decision in Cok, noting that an order regulating Petitioner's abusive motion practice required that:

> A sufficient record must be established to support and justify such an order. Cok, 985 F.2d at 35. The litigant must be warned that such filing restrictions are being contemplated and given an opportunity to oppose them. Id. There should be no reasonable alternative. Id. at 36. And the restrictions must not be of unlimited breadth. Id. They must be tailored to deal with the problems identified by the Court.

[Pet. App. p. 14.] In this case, the support and justification for the imposed filing restrictions were more than sufficiently established in the record. Indeed, the Bankruptcy Court had only recently entered an order that cataloged Petitioner's misuse of the bankruptcy process, determining that "the various forms of relief requested by Petitioner have long ago moved beyond frivolous to the malicious and vexatious." [Bankr. Docket No. 727, p. 18.] Petitioner was served with the Objection of Chapter 7 Trustee to Robert White's Motion to Vacate Sale Order, wherein the Trustee renewed his previous request to the Bankruptcy Court for the issuance of an injunction to prohibit Petitioner from filing any further pleadings concerning the Chapter 7 case.[13] [Bankr. Docket No. 750.] At the hearing on the Second Motion to Vacate, Petitioner was given an opportunity to object to the requested prohibition, but declined to do so. Given these factors,

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[13] White was also aware of the Bankruptcy Court's regret at not having issued such an order when first requested by the Trustee. [Bankr. Docket No. 727, n.12.]

Petitioner's assertion that he "was not given any warning of the Bankruptcy Court's pre-filing injunction nor given an opportunity to oppose it," Petition at pp. 41-42, is simply not credible and contradicted by the facts in the record.[14] Instead of presenting any arguments in opposition to the Trustee's request for a preliminary injunction in the first instance, Petitioner chose to file this appeal.

The filing restrictions imposed by the Bankruptcy Court are appropriate, and the only reasonable means available for protecting the Debtor's estate and the integrity of the bankruptcy process. Petitioner's refusal to abide by earlier Bankruptcy Court orders – monetary and contempt sanctions – demonstrates the need for the restrictions, as well as the absence of any viable alternative. Petitioner's repetitive, improper, and meritless litigation tactics are clearly intended to harass the Trustee and delay administration of the Chapter 7 case, in order to compel the Trustee to reach a financial settlement with Petitioner. In enjoining Petitioner from filing *pro se* papers, the Bankruptcy Court recognized that it is simply not fair to the remaining unsecured creditors for the

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[14] White's arguments that the Trustee's request for an injunction were procedurally inadequate are unavailing. White suggests that the Trustee should have filed a separate motion for sanctions, but this was not a request for sanctions. Nor is the Bankruptcy Court required to issue a show cause order. The procedures followed by the Trustee and the Bankruptcy Court in this case were exactly what the First Circuit required in Cok: notice of the request for an injunction and an opportunity to be heard in opposition to the request. White's due process rights, which have been scrupulously protected in this case, require nothing more.

estate to be forced to defend against his continued abuse of the bankruptcy process. Absent the Bankruptcy Court injunction, Petitioner would continue to litigate (and relitigate) the Sale Order at the expense of the estate, even though his appellate avenues have been completely closed. Accordingly, the Bankruptcy Court order enjoining Petitioner from filing, *pro se*, any further documents with the Bankruptcy Court in the Chapter 7 case, except under a limited set of circumstances, was an entirely appropriate. As the District Court noted,

> [I]n light of [White's] excessive filings and abusive motion practice, the Bankruptcy Court's decision to bar [White] from filing additional papers, except in two narrow circumstances, was well within its discretionary power "to regulate the conduct of abusive litigants." Cok v. Family Court of R.I., 985 F.2d 32, 34 (1st Cir. 1993)(per curiam).

[Pet. App. p. 6.] The First Circuit concurred, holding that,

> [T]he order limiting White's ability to file further actions in this case is well supported by the record and properly crafted to prevent further inappropriate filings in this case.

[Pet. App. p. 3.] White has presented no argument, other than a due process allegation based on his improper mischaracterization of the record, that

would justify a result contrary to those ordered by the District Court and the First Circuit. His request for relief from the Bankruptcy Court's injunction should be denied by this Court as well.

C. The First Circuit Properly Affirmed the Bankruptcy Court Denial of the Application for Payment

Petitioner's right to payment of royalties pursuant to the terms of the Acquisition Agreement is a garden-variety prepetition claim. Petitioner has provided no postpetition services, or other benefit, to the Debtor's estate, and accordingly there is no basis for elevating his prepetition royalty claim to priority administrative expense status. In fact, in denying the Application for Payment, the Bankruptcy Court did not need to look further than the Application for Payment itself to recognize Petitioner's argument is wholly without merit, and the First Circuit agreed with that decision.

Pursuant to the Application for Payment, Petitioner states that the Acquisition Agreement is a

non-executory contract,[15] and admits (i) that he completed his performance under the Acquisition Agreement prepetition (by transferring his rights in the software at issue to the Debtor), (ii) that he has not provided any services to the Debtor postpetition, and (iii) that the only remaining obligation under the Acquisition Agreement is the payment of royalties. [Bankr. Docket No. 764.]

Section 503(b) of the Bankruptcy Code provides in pertinent part that "there shall be allowed administrative expenses ... including ... the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." 11 U.S.C. § 503(b)(1)(A). The Bankruptcy Court correctly noted that, in order for Petitioner's

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[15] The Trustee acknowledges that on January 9, 2004, the Debtor filed a Motion Pursuant to Section 365 of the Bankruptcy Code, and Federal Rules of Bankruptcy Procedure 6006 and 9014 for an Order Authorizing (I) the Assumption and Assignment of Certain Executory Contracts to Kubotek USA, Inc. and (II) the Rejection of Certain Executory Contracts (the "Rejection Motion"), whereby the Debtor purportedly sought to reject the Acquisition Agreement. [Bankr. Docket No. 230.] The Court granted the Rejection Motion on January 27, 2004. [Bankr. Docket No. 235.] The Trustee agrees with White that the Acquisition Agreement is not an executory contract, and submits that the Rejection Motion merely listed the Acquisition Agreement as one of many contracts to be rejected, probably as a precautionary measure given White's litigious nature. In any event, the Rejection Motion cannot transform a non-executory contract to an executory contract simply by listing it in the exhibits of a pleading. Even assuming that the Acquisition Agreement was an executory contract that was rejected by the Debtor, White's request for an administrative expense claim would be unavailing. See In re Enron Corp., 279 B.R. 695 (Bankr. S.D.N.Y. 2002).

claim for royalties arising under the Acquisition Agreement from July 1, 2003 to December 3, 2003 (the "Royalty Claim") to be afforded administrative expense status, Petitioner must show that his right to the payment of such royalties (1) arises from a transaction with the trustee or debtor-in-possession, rather than from a prepetition transaction with the Debtor, and (2) the consideration supporting the claim must have benefited the estate in some demonstrable way. See Mason v. Official Comm. of Unsecured Creditors (In re FBI Distribution Corp.), 330 F.3d 36, 42 (1st Cir. 2003) (emphasis added); In re O'Brien Envtl. Energy, Inc., 181 F.3d 527, 532-33 (3d Cir. 1999); Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.), 536 F.2d 950, 954 (1st Cir. 1976). The Application for Payment does not meet either of these requirements.

There was, as the Bankruptcy Court found, no postpetition agreement between the Debtor and Petitioner, and no apparent benefit to the estate from this alleged "transaction." Clearly, as concluded by the Bankruptcy Court, Petitioner's right to payment of the royalty arises out of a prepetition contract with the Debtor, not from a postpetition transaction with the Trustee or Debtor. Indeed, a portion of the Royalty Claim was supposedly generated in the prepetition period. Further, Petitioner admits that he has provided no services to the Debtor postpetition. The royalties imposed under the Acquisition Agreement do not confer a benefit upon the estate, or otherwise constitute an actual, necessary cost of preserving the estate, because the benefit provided to the Debtor thereunder – the transfer of FastSURF's rights in

certain computer programs – was entirely complete prepetition. In light of these facts, the imposition of a postpetition royalty imposes a burden, not a benefit. Petitioner's Royalty Claim is a prepetition claim arising out of a prepetition contract, plain and simple.

Contrary to Petitioner's suggestion otherwise, Petitioner's Royalty Claim is not entitled to priority simply because the right to payment was triggered by postpetition product sales. In FBI Distribution, the First Circuit held that a claim for postpetition payments, pursuant to a prepetition non-executory retention agreement, was a contingent claim and was not entitled to administrative priority simply because the right to payment arose during reorganization when the contingency occurred. FBI Distribution, 330 F.3d at 48.

Similarly, in In re Waste Systems Int'l, Inc., 280 B.R. 824, 827 (Bankr. D. Del. 2002), the court denied administrative expense status to a claim for royalties generated from postpetition sales pursuant to a prepetition non-executory contract, stating:

> [Claimant] asserts that the royalty payments due under the Consulting Agreement are post-petition administrative claims because the payments arise only after [the debtor] delivers waste to the [waste facility]. We disagree. The obligation to make the royalty payments arose when the Consulting Agreement was executed pre-petition. The fact that the pre-

> petition obligation is dependent upon the occurrence of a post-petition event does not make the obligation an administrative claim. Whether the event occurs or not determines the amount of the contingent claim, not its priority (internal citations omitted).

Waste Systems, 280 B.R. at 827. Just as in FBI Distribution and Waste Systems, the Debtor's obligation to make royalty payments arose prepetition – at the time the Acquisition Agreement was executed – and the fact that the payments are dependent on the occurrence of postpetition sales does not transform the claim from a mere unsecured non-priority claim to an administrative expense.

Petitioner's other arguments (not raised in the Bankruptcy Court) for administrative expense status need not be considered by this Court,[16] and, in any event, are similarly unavailing. While acknowledging that the Acquisition Agreement is a non-executory contract, Petitioner makes the nonsensical arguments that the Acquisition Agreement (i) was a Section 363 transaction with the debtor-in-possession that requires payment in the "ordinary course of business," Petition at pp. 22-24, or (ii) "survives a non-plan sale." Petition at pp. 24-

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[16] "It is well established that appellate courts will not consider an issue which was not before the trial court and which is first raised on appeal." In re Weinstein, 217 B.R. 5, 8 (D. Mass. 1998) (citing Singleton v. Wulff, 428 U.S. 106, 120 (1976)); see also In re Rauh, 119 F.3d 46, 51 (1st Cir. 1997) (refusing to consider a new theory of the case first raised on appeal since it had not been presented to the bankruptcy court).

26. With respect to the "survival" argument, Petitioner is just duplicating his Section 363(f) argument, which is legally incorrect and, in any event, not preserved for this appeal (see pp. 24-25 above).

In sum, as noted by the First Circuit [Pet. App. p. 3], claims arising from prepetition non-executory contracts, such as the Royalty Claim, are merely general unsecured claims. See FBI Distribution Corp., 330 F.3d at 48; Stewart Foods Inc. v. Broecker (In re Stewart Foods, Inc.), 64 F.3d 141, 145 (4th Cir. 1995) ("regardless of the nature of the contract, if at the time of the bankruptcy filing the debtor has an obligation under the contract to pay money to the non-debtor party, that obligation is handled as a pre-petition claim in the bankruptcy proceedings."). Petitioner has the right to have the amount of the Royalty Claim – including potential future royalties payable under the Acquisition Agreement –be determined by the Bankruptcy Court, and to share *pro-rata* in distributions paid to all unsecured creditors, based on the amount of the Royalty Claim. However, in the absence of a transaction with the postpetition Debtor and any benefit to the Debtor's estate, he is not entitled to have that claim paid prior to the claims of all of the Debtor's other unsecured creditors.

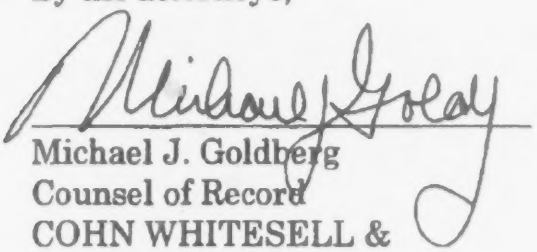
Conclusion

Based on the foregoing, the Petition should be denied, and the Bankruptcy Court's orders permitted to stand.

Dated: February 20, 2008

JOSEPH B. COLLINS
Chapter 7 Trustee of
CK Liquidation Corporation

By his attorneys,



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No. 07-949

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In the Supreme Court of the United States

ROBERT WHITE, PRO SE,

Petitioner;

v.

JOSEPH B. COLLINS,
Chapter 7 Trustee for
CK LIQUIDATION CORP,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the First Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner, Robert White - pro se (hereafter "White"), hereby replies to Respondent's Opposition Brief (Respondent is the Chapter 7 Trustee in this bankruptcy case and appeal, hereafter the "Trustee").

The Trustee raises several procedural objections to White's F.R.C.P. 60(b)(4) Motion to Vacate the Sale Order (and thus to White's petition), and those objections must be defeated in this Reply Brief (or in the writ) before this Court can review White's questions presented in his writ of certiorari.

The Trustee complains that White's 60(b)(4) motion was late beyond reasonableness, because White waited two and a half years after the sale to file his motion to vacate the sale order. White's contends that his delay is reasonable, considering he has been pro se at all times after the bankruptcy court ratified the sale order, and at all times thereafter when the Trustee prosecuted White for sanctions and contempt (whereby White was incarcerated), which consumed two of those two and a half years after the sale, including White's appeals and writs taken against said sanctions, contempt, and incarceration.

The Trustee's own brief chronicles his proceedings against White in enough detail for this Court to realize that White was not idly sitting on his rights after the sale order was ratified. To the contrary, White was inundated responding against the Trustee's process, which included a three year avoidance recovery action which has still not concluded in the bankruptcy court and 42 days of incarceration for not being able to pay the bankruptcy court's $3,500 sanction. As the Trustee's brief clearly demonstrates on pages 9-12, White's appeal of the bankruptcy court's first sanctions took over two and a half years. That appeal sat in the First Circuit

Court of Appeals for over two years, from April 8, 2005 until July 27, 2007, without a stay or ruling.

The Trustee complains that White should have raised his instant property issue challenge in White's first 60(b) motion to vacate the sale order. However, White filed that particular 60(b) motion entirely in response to estate counsels' fee applications (estate counsel are the debtor's counsel, and creditors committee counsel, who is also the Trustee's counsel). White accused estate counsel of fraud after their fees consumed over half of the $750,000 they promised creditors as a dividend. White had a very limited amount of time to challenge those final fee applications. White did not have the intellectual or monetary resources to broaden the scope of his first 60(b) motion, which had a one year statute of limitations, whereas White's instant 60(b)(4) motion does not.

The Trustee also suggests that White should have included his property interest challenge within White's initial appeal of the sale order. White's petition explains that the true intent of the debtor and buyer to breach White's contract, instead of assuming it as they announced, and thus to put White's property interest at issue, was not announced by them until two months after the sale, well after White's time to appeal the sale order had expired.

The Trustee seems to be in some confusion whether the First Circuit Court of Appeals actually ruled on the merits of White's 60(b)(4) motion. In footnote 9 of the Trustee's brief the Trustee claims the Circuit Court's Judgment states only that the panel considered the record and read the briefs of the parties. However, the Judgment is clear that the Appeals Court considered and agreed with the bankruptcy court's ruling on the merits of White's 60(b)(4) motion:

> We affirm the judgment of the bankruptcy court, essentially for the reasons given in order and the memorandum of decision, dated May 9, 2006. We add only the following.
>
> The record indicates that White was given prior notice of the sale of debtor's assets and the opportunity to challenge that sale. Hence, any claim that the sale violated his right to due process is without foundation.

White's 60(b)(4) motion, appeals thereof, and instant petition all clearly argue that the debtor and buyer violated their notice of the sale by announcing they were assuming White's contract 4 days prior to the sale and then rejecting White's contract two months after the sale[1], and such faulty notice clearly violates procedural due process. Additionally, White's substantive due process challenge to the sale, leveled in his 60(b)(4) motion, on appeal, and in White's petition clearly accuses the sale of offending the conscience of justice, and this substantive due process challenge includes White's "absolute priority" rule challenge as well as White's 5th Amendment "public purpose" challenge. White believes the "property interest" requirement in §363(f) and §363(e) make it difficult for a party without a property interest in the debtor's assets sold to challenge a §363 sale on procedural or substantive due process grounds; ie.,

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1. Bankruptcy Court docket # 782, April 25, 2006 transcript White's motion to vacate hearing, pg.2:ln.21 – pg.4:ln.7.

White's property interest allow such a challenge.

The Trustee also argues that many of White's issues are duplicative of issues White previously raised in other motions and appeals; however, in an conflicting revelation in footnote 11 on page 25 of the Trustee Brief the Trustee admits that White's property interest and due process challenges are being raised for the first time in this instant appeal. Maybe the Trustee only means that White failed to properly preserve these issues in the bankruptcy court; however, White clearly argued his property interests and the faulty notice and due process violations at the hearing on his motion to vacate.

The Trustee also argues that White's petition does not present a compelling reason why certiorari should be granted by this Court, as prescribed and required under Sup. Ct. R. 10. White simply offers that no US Supreme Court decision has ever addressed the important Federal questions White raises concerning the Bankruptcy Code, which are: 1) whether a nonexecutory contract is automatically converted to a prepetition claim and therefore excluded from consideration under 11 U.S.C. §§ 503 and 363(f), 2) whether the "absolute priority" rule applies to a contested nonplan sale, 3) whether the 5th Amendment is offended by a perjurious buyer at a §363 sale, and 4) whether the bankruptcy court must issue an order to show cause prior to issuing a prefiling injunction against a pro se litigant, and/or hold a hearing addressing only that injunction. White also argues that the judge and not the opposition must explicitly warn the pro se litigant of the impending injunction.

Finally White points out that his appeal of his administrative expense application and appeal of the injunction do not suffer from a lateness challenge or ruling. White also points out that the bankruptcy

court never held a hearing on White's administrative claim. Evidently the bankruptcy court felt confident enough that all nonexecutory contracts are exempt from administrative priority, regardless of the terms of those contracts, that the bankruptcy court denied White his statutory opportunity to prove his claim. Unfortunately, that self made rule comes from the erroneous logic in ***In re FBI Distribution Corp.***, 330 F.3d 36, (1st. Cir. 2003):

> Under a nonexecutory contract, in which the nondebtor owes no future performance, the nondebtor provides no consideration "after the commencement of the case," and thus is not entitled to priority.

Such a sweeping and unconditional rule is not supported by the Bankruptcy Code or by the facts of this case. The postpetition debtor's choice to exercise terms and generate revenue permitted under White's nonexecutory software royalty contract clearly benefited the estate, making royalties due under White's contract subject to administrative priority.

Wherefore the above reasons, and for reasons presented in White's writ of certiorari, White's writ should be granted.

Respectfully submitted on this 28th day of February, 2008, by Robert White – pro se.

Robert White – pro se